Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CAROLYN H. SRIVASTAVA,

Petitioner,

v.

TRUSTEES OF INDIANA UNIVERSITY,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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91pp

QUESTIONS PRESENTED

1. With regard to employment discrimination laws which require administrative exhaustion prior to litigation, if a plaintiff alleges one type of disparate treatment or retaliation in the charge filed with the Equal Employment Opportunity Commission ("EEOC"), can the plaintiff, in ensuing litigation based on the charge, allege a different or additional type of disparate treatment or retaliation, assuming that the adverse employment action complained about is the same in both the EEOC charge and the litigation?

2. Must the "legitimate, non-discriminatory reason" for an adverse employment decision in an employment discrimination lawsuit be presented as admissible evidence, as previously held by this Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 8, n.9 (1981)?

3. Should this Court's previous holding regarding the standards for award of attorney's fees to a prevailing defendant in an employment discrimination lawsuit, as set forth in *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 421 (1978), be clarified, and the standards more precisely defined?

4. Should a prevailing defendant in an employment discrimination lawsuit, in moving for award of attorney's fees pursuant to 42 U.S.C. § 2000e-5k, be required to follow the procedural stipulations of Rules 54(d)(2) and 6(b) of the *Federal Rules of Civil Procedure*?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Carolyn H. Srivastava prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on July 11, 2000.

OPINIONS BELOW

The July 11, 2000 opinion of the Court of Appeals, case number 99-3272, whose judgment is sought to be reviewed, is unpublished and is reprinted in Appendix A hereto. The prior opinions of the United States District Court for the Southern District of Indiana, case number IP98-0242-C-H/G, entered September 9, 1999, August 26 - 27, 1999, July 1, 1999, June 4, 1999, May 27, 1999, and October 18, 1999 are unpublished and are reprinted in Appendix B hereto.

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered July 11, 2000. Jurisdiction of this Court to review a petition for a writ of certiorari is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES

This case involves the following statutory provisions and rules, all of which are set out in Appendix C.

1. Section 2000e-2(a) of Title 42, United States Code

2. Section 2000e-3(a) of Title 42, United States Code

3. Section 2000e-5(a) of Title 42, United States Code

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STATUTORY PROVISIONS AND RULES - Continued

5. Section 12112(a) of Title 42, United States Code

6. Section 12117(a) of Title 42, United States Code

7. Section 12203 of Title 42, United States Code

8. Section 1981a of Title 42, United States Code

9. Section 1601.12(b) of Title 29, Code of Federal Regulations

10. Rule 54(d) of the *Federal Rules of Civil Procedure.*

11. Local Rule L.R. 54.1 of the local rules for the United States District Court for the Southern District of Indiana

12. Rule 6(b) of the *Federal Rules of Civil Procedure.*

STATEMENT OF THE CASE

I. Statement of facts

"Trustees of Indiana University" ("IU"), the defendant employer in this case, has legal controlling authority over the Indiana University-Purdue University Indianapolis ("IUPUI") campus, Indianapolis, Indiana. The claims in this lawsuit arose within Indiana University School of Medicine ("IUSM"), which is a division of IUPUI.

I (plaintiff-petitioner) have a Ph.D. degree in genetics. I am female. I began my employment in the Department of Pediatrics, IUSM, on August 1, 1990 as a Research Associate. I was promoted to Assistant Scientist, a non-tenure-track faculty position, effective July 1, 1991. I was appointed to the tenure-track in the Department of Pediatrics, effective July 1, 1993. I signed an initial contract promising me salary and space to perform my research, teaching, and service duties, and secretarial support from July 1, 1993 through June 30, 1996.

In an annual review dated August 16, 1994, my progress was rated satisfactory, and it was stated that reappointment for the 1996-1997 academic year would be recommended. In November 1994, after a compulsory evaluation paid for by the Department of Pediatrics, an IUSM psychiatrist diagnosed me with a mental disability and in February 1995, I complained about sex discrimination in the Department of Pediatrics. In a letter dated March 16, 1995 my department chairman notified me that I would not be reappointed to my position in the Department of Pediatrics for the 1996-1997 academic year. Additionally, during the period November, 1994 through July, 1996 the department chairman removed all positive evaluations and information from my personnel file and filled it with false, defamatory information and allegations, as well as psychiatrists' reports. He subsequently promised to share the information with other potential employers.

On approximately November 6, 1995, upon the encouragement of colleagues, I applied for the position of Chairman of the Department of Microbiology and Immunology ("Microbiology Chairman") within IUSM, a position which had been advertised in an internationally-read scientific journal and for which I was qualified. On approximately December 17, 1996 I received a letter dated December 16, 1996 from the dean's office, stating that a less qualified male candidate had been appointed to the position.

Since I knew I was more qualified than the individual appointed to the position, I petitioned IUSM about the position during the period December, 1996 - July, 1997 in an attempt to resolve the matter, to no avail: I petitioned the dean of IUSM regarding the Microbiology Chairman position via a letter dated July 7, 1997. In that letter I alleged that I had been subjected to discrimination based on sex and disability at IUSM. Shortly thereafter, I was informed by University attorneys that I could not work at IUSM at all.

II. Previous action

From May 2, 1997 until January 28, 1998 I pursued a *pro se* lawsuit in the United States District Court for the Southern District of Indiana captioned *Srivastava v. Schreiner*, et al., IP97-0704-C-M/S under 42 U.S.C. § 1983, the principal claim of which was that the decision made in March, 1995 not to reappoint me to my faculty position in the Department of Pediatrics within IUSM violated my civil rights. Jurisdiction was invoked pursuant to 28 U.S.C. § 1343(a)(3).That lawsuit was dismissed, mainly because the claim was untimely, but the District Court gave me permission to file a second lawsuit based on newer, timely claims.

I filed charge number 240961901 with the Equal Employment Opportunity Commission ("EEOC") on June 12, 1996 alleging that the decision not to reappoint me to my position in the Department of Pediatrics, IUSM, in March, 1995 was a result of disability discrimination, in violation of

The Americans With Disabilities Act of 1990, 42 U.S.C. § 12111 *et seq.* ("ADA"). That charge was dismissed because it was untimely. I did not pursue litigation for that charge.

III. This case: EEOC Charge and Proceedings in District Court

I filed EEOC charge number 240972835 on August 29, 1997 alleging that I had not been hired into the Microbiology Chairman position as a result of disability discrimination and retaliation for having previously filed EEOC charge number 240961901. (Appendix D) I also alleged in my charge that I was subsequently told that I could not return to IUSM, also as a result of disability discrimination and retaliation. The charge was filed within three hundred days of notification of the hiring decision. I wrote a letter to the EEOC dated September 5, 1997 further explaining my charge. (Appendix D) I enclosed supporting documents, at least one of which suggested tht I had been subjected to discrimination based on sex. The EEOC began a preliminary investigation of my charge, and then encouraged me to request a Notice of Right to Sue, which I did. I received the Notice of Right to Sue permitting me to file suit under 42 U.S.C. § 12111 *et seq.* and 42 U.S.C. § 12203 on January 26, 1998.

I have proceeded *pro se* throughout this litigation. I filed my original complaint in this case in the United States District Court for the Southern District of Indiana on February 20, 1998 alleging disability discrimination, retaliation for complaints about disability discrimination, and violations of my civil rights under 42 U.S.C. § 1983, with Indiana University and Gerald L. Bepko ("Bepko"), Vice President of Indiana University and Chancellor of IUPUI, as defendants. Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1343(a)(3). The claims stated in the complaint were not exactly those in the EEOC charge, but were related.

On Monday, April 27, 1998, I filed **Plaintiff's Reply to Defendants' Answer to Plaintiff's Complaint** ("**Plaintiff's Reply**") to bring the claims from my EEOC charge number 240972835 into the litigation under the ADA, as stated in the charge, and also under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 *et seq.* ("Title VII"), in addition to the claims already being litigated under 42 U.S.C. § 1983. Although I did not title the filing as a motion to amend my complaint, it was clear that that was what I really wanted to do. In it, I provided an extensive description of factual allegations, legal theories applied to the allegations, and relief requested. I attached a copy of the Notice of Right to Sue. My **Plaintiff's Reply** had all the essential components of a complaint, and it exactly met the ninety-day statute of limitations for litigating claims in an EEOC charge after receipt of a Notice of Right to Sue. The District Court, in an entry dated May 7, 1998, struck my **Plaintiff's Reply** from the record, and returned it to me.

I subsequently filed a motion to amend my complaint to bring in the claims from my EEOC charge under Title VII, but not the ADA. IU filed a motion to prevent me from obtaining any discovery from it, which the District Court granted. On September 10, 1998 the District Court permitted me to file proposed **Revised Amended Complaint** to allege that I had been denied the Microbiology Chairman position, and had been ordered not to return to IUSM as a result of discrimination based on sex and retaliation for complaints about discrimination based on sex, and pursue my claims under 42 U.S.C. § 2000e-2 *et seq.* and 42 U.S.C. § 2000e-3(a) invoking jurisdiction pursuant to 42 U.S.C. § 2000e-5, and 28 U.S.C. §§ 1331 and 1343(a)(4), with IU as the sole defendant. That is the currently operational complaint. (Appendix D)

Also on September 10, 1998, the District Court moved for summary judgment on behalf of defendant IU. In the September 10, 1998 filing, the District Court also offered a suggested "legitimate, non-discriminatory reason" for the failure to hire me as Microbiology Chairman. The issues to be addressed in my answer to the motion for summary

judgment were whether I had exhausted administrative remedies for filing a Title VII complaint and whether I had complied with the applicable statute of limitations for filing an EEOC charge. I presented evidence and argument supporting my position that I had exhausted administrative remedies for a Title VII complaint, and that I had complied with the applicable statute of limitations.

I also filed a cross-motion for summary judgment on the merits. Despite the District Court's ban on discovery, I presented significant evidence for a pattern of sex discrimination with respect to faculty ranks within IUPUI, and especially within IUSM, and for a pattern of retaliation against me for my complaints about sex discrimination. I presented a *prima facie* case of discrimination based on sex and retaliation for complaints about discrimination based on sex in the decision not to hire me into the Microbiology Chairman position.

IU, in its reply, did not present a single bit of evidence relating either to the issues raised in the District Court's motion for summary judgment, or to the merits of the case. IU did, however, in its brief, allege several different dates for the Microbiology Chairman decision, only one of which would make my EEOC charge timely. That was the December 16, 1996 letter. IU did not show how the other proffered dates related to the Microbiology Chairman decision. None was presented as testimony. One cannot determine from reading the brief who actually supplied the dates to IU's attorneys.

On May 27, 1999 the District Court entered judgment in favor of defendant on the basis that I had not exhausted administrative remedies for a Title VII complaint, denied my motion for summary judgment in my favor, and struck several of my intermediate filings from the record.

On June 2, 1999 I filed a motion for partial relief from judgment (which I characterized as a motion mad pursuant to Rule 60(b), but was according to Circuit precedent a Rule 59(e) motion), which the District Court denied on June 4, 1999. Pursuant to the District Court's invitation to continue

to object, I subsequently filed two briefs addressing the substantive issues of the litigation in support of my motion for partial relief, and a proposed amended complaint. The district court denied my motion on July 1, 1999.

On July 6 and 13, 1999, IU's attorneys telephoned me at home and threatened to move for award of attorneys' fees from me if I did not immediately drop the lawsuit. I felt frightened, but after spending so much time and effort on the lawsuit, and knowing I had a legitimate case, I declined their "offer." On July 6, 1999 they filed **IU's Motion for Award of Attorney's Fees** pursuant to 42 U.S.C. § 2000e-5k, specifying that the motion was made pursuant to the judgment entered May 27, 1999. They cited as their principal justification for the award *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 421 (1978). The motion addressed the substantive issues of the litigation.

On Monday, July 12, 1999, I filed a combination Rule 59(e) motion with respect to the District Court's judgment entered July 1, 1999 and response to **IU's Motion for Award of Attorney's Fees.** In the motion, I addressed the substantive issues of the case. I also argued that IU's motion was untimely, invoking *Fed.R.Civ.P.* 54(d)(2)(B). The District Court scheduled oral argument on IU's motion for August 26, 1999. I filed motions pursuant to *Fed.R.Civ.P.* 60(b) on August 10, 1999 and August 18, 1999 with regard to new evidence which accrued after May 27, 1999. I proposed several amended complaints which would have cured the defect alleged by the District Court.

At oral argument on August 26, 1999 I again argued that IU's motion was untimely, to which IU did not respond, but IU suddenly invoked *Fed.R.Civ.P.* 11. Also at oral argument and subsequently in a written **Entry** dated and entered on August 27, 1999, the District Court denied all of my pending motions and awarded attorneys' fees to defendant, indicating that, in its opinion, I had continued to litigate untimely claims, but not defining which claims were untimely or how they were untimely. The District Court also

held that my lawsuit was frivolous because I allegedly had no right to apply for the Microbiology Chairman position (the so-called "legitimate, non-discriminatory reason").

On September 3, 1999 I filed a Rule 59(e) motion for alteration of judgment. The District Court denied my motion in an entry dated September 9, 1999.

I filed two motions with the District Court, on October 4, 1999 and October 12, 1999, to have the stricken filings reentered into the record. In an entry dated October 18, 1999, the District Court granted my motion. Pursuant to that entry, I re-filed the original copy of my **Plaintiff's Reply**, originally filed April 27, 1998 (Docket number 13).

IV. This case: Appeal

I first filed a Notice of Appeal from the District Court's May 27, 1999 judgment on June 2, 1999. That appeal was docketed as number 99-2427. The Court of Appeals for the Seventh Circuit ordered that my Brief of Appellant be filed on or before August 23, 1999. Since as of August 23, 1999, several post-judgment motions, including a Rule 59(e) motion, addressing substantive issues, as well as IU's motion for award of attorneys' fees, were still pending, I felt I could not write an appellate brief. I therefore moved to have the appeal dismissed. My motion was granted.

On September 2, 1999 I took appeal from the District Court's August 27, 1999 **Entry**, which incorporated by reference the August 26, 1999 oral ruling. That appeal was docketed as number 99-3272. I filed my **Brief of Appellant** on October 18, 1999. In my appeal, I addressed several substantive and procedural issues in the litigation. My relevant arguments were that 1) The District Court improperly struck my timely petition to bring the claims from my EEOC charge into the litigation, but granted a later, untimely motion to amend my complaint; 2) The District Court granted summary judgment to defendant on the basis that I allegedly failed to exhaust administrative remedies for a Title VII complaint and then failed, upon my Rule 59(e)

and 60(b) motions, to reopen the case and allow me to correct the alleged defect; 3) The District Court permitted IU to avoid giving any testimony whatsoever, to present confusing and conflicting arguments made "solely to harass," and to avoid providing necessary evidence; 4) The District Court inappropriately made an employment decision, itself invoking, without evidence, a "legitimate, non-discriminatory reason," (in both its May 27, 1999 and August 27, 1999 judgments) and, in general, improperly denied my Motion for Summary Judgment in my favor, when IU failed to meet its burden in responding to my motion; and 5) That IU's motion for award of attorneys' fees was untimely filed, and unjustified on the merits. IU also argued those issues, except the timeliness of its motion for award of attorneys' fees, in its brief.

The Court of Appeals entered judgment on July 11, 2000, holding that 1) I had forfeited my right to appeal substantive matters within the litigation because I had filed my Notice of Appeal more than thirty days after entry of the May 27, 1999 judgment, and it therefore did not review the District Court's ruling on the substantive matters of the litigation; 2) award of attorneys' fees was warranted because my claim was allegedly frivolous; and 3) IU's motion for award of attorneys' fees could be considered timely because an untimely motion made pursuant to *Fed.R.Civ.P.* 54(d)(2) is not a jurisdictional defect, and the District Court therefore had jurisdiction to consider it timely.

On final note on the proceedings: As stated in the District Court's May 27, 1999 ENTRY, p.1, I was criminally prosecuted for stalking. I represented myself through most of that case, and was found Not Guilty after a jury trial on March 9-10, 2000. I am now suing the county prosecutor and other officials in United States District Court under 42 U.S.C. § 1983 for multiple Constitutional violations in bringing the prosecution. That case is captioned *Srivastava v. Newman*, case no. IP00-0617-C Y/G. I am also suing those who gave false testimony to the prosecutors to have the criminal prosecution brought in Marion [Indiana] Superior Court for

Abuse of Process and other tort claims. That case is captioned Srivastava v. *Indianapolis Hebrew Congregation, Inc., et al.*, case no. 49D03-0004-CT-000580I am representing myself in both lawsuits. One of the defense attorneys in the tort claims lawsuit is William P. Wooden, the head of the law firm representing IU in this case. He told me that he was considering calling Bepko as a witness in that case, suggesting that Bepko was involved in the criminal prosecution against me. I have also now applied to law school.

REASONS FOR GRANTING THE WRIT

I am bringing this petition because I believe this case raises some critical issues in employment discrimination law which require a ruling from this Court, so that the decision will be applied nationwide. I argue that if the decisions of the Court of Appeals for the Seventh Circuit in this case are allowed to stand, employment discrimination laws will be effectively eviscerated, because litigation, the only effective means of enforcement of these important civil rights laws, will be discouraged and liability easily evaded by unscrupulous employers with clever attorneys.

As a preliminary matter, the Seventh Circuit panel has held in this case that I could not appeal some of the issues in my case, because the second appeal (number 99-3272) was taken more than thirty days after the initial entry of judgment on May 27, 1999. I have two responses: One, I filed timely Rule 59(e) motions addressing the substantive issues in the litigation, which the Seventh Circuit has held tolls the statute of limitations for filing a Notice of Appeal. *Charles v. Daley, et al.*, 799 F.2d 343-344, 348 (7th Cir. 1986); *Russell v. Delco Remy*, 51 F.3d 746, 749 (7th Cir. 1995); *Britton v. Swift Transp. Co.*, 127 F.3d 616, 618 (7th Cir. 1997), as well as Rule 60(b) motions based on evidence obtained after entry of judgment. In its **Entry** of August 27, 1999, the District Court denied all of my post-judgment motions. Therefore, my

appeal taken from that judgment on September 2, 1999 was timely with respect to the issues raised in my post-judgment motions, which included all of the issues raised in the litigation. I exactly complied with this Court's ruling in *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 200 (1988). I argue that my case also fits this Court's ruling in *Foman v. Davis*, 371 U.S. 178 (1962). The reason that I moved to have the first appeal (number 99-2427) dismissed was that the case was not yet ripe for appeal.

Secondly, the basic issues which I raised in my appeal and in this petition were addressed in the District Court's ruling of August 26-27, 1999. It is undisputed that the appeal taken from that judgment was timely.

The Seventh Circuit panel has also alleged that some of my filings were repetitive and scandalous. If they were repetitive, then they were arguments made in response to IU's repetitive filings. I argue that it was not my filings that were scandalous, but the behavior of IUPUI administrators which inspired the filings.

I. Question 1: If a plaintiff alleges one type of disparate treatment or retaliation in the charge filed with the EEOC, can the plaintiff, in ensuing litigation based on the charge, allege a different or additional type of disparate treatment or retaliation, assuming that the adverse employment action(s) complained about are the same in both the EEOC charge and the litigation?

This question involves differential rulings between Courts of Appeals, as well as disagreements *within* at least three Courts of Appeals on an important question of Federal law that has not been, but should be, decided by this Court. It also involves a ruling by a Court of Appeals on an important question of Federal law that has not been, but should be, decided by this Court.

This issue addresses the fact that I filed my EEOC charge number 240972835 in this case under the ADA, alleging disability discrimination and retaliation in the

decision not to appoint me Microbiology Chairman, and in the current version of my complaint, I am pursuing the same claims under Title VII alleging discrimination based on sex and retaliation for complaints of discrimination based on sex in the decision not to appoint me Microbiology Chairman. The employment decision in the EEOC charge and the complaint is the same; the legal theories are different. So the question is, if one type of disparate treatment or retaliation is alleged in the EEOC charge, may an additional or different type of disparate treatment or retaliation *for the same adverse employment action(s)* be alleged in the subsequent litigation? As a corollary, should the answer to the question be different if the two types of discrimination are covered by different statutes?

The Fifth Circuit seems to be the one Court of Appeals which has consistently held that a different or additional legal theory can be applied after filing the EEOC charge, beginning with *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 456 (5th Cir. 1970), which held that the failure to attach the correct legal conclusion to a set of factual allegations is a mere technical defect. "[T]he crucial element of a charge of discrimination is the *factual* statement contained therein." *Sanchez* at 462 (emphasis in original). See also *Fellows v. Universal Restaurants, Inc.*, 701 F.2d 447, 450 (5th Cir. 1983); *Vuyanich v. Republic National Bank of Dallas*, 723 F.2d 1195, 1196, 1201 (5th Cir. 1984).

The Third Circuit generally upheld *Sanchez*, except there was a dissenting opinion. *Hicks v. ABT Associates, Inc.*, 572 F.2d 960 (3rd Cir. 1978). The Eleventh Circuit also generally upheld *Sanchez*. *Evans v. U.S. Pipe and Foundry*, 696 F.2d 925, 928 (11th Cir. 1984).

The Sixth Circuit has created its own set of rules addressing the issue. In *Ang v. Proctor & Gamble Co.*, 932 F.2d 540, 546 (6th Cir. 1991), the Sixth Circuit held that a plaintiff could not allege an additional type of discrimination in litigation for the same adverse employment action as in his EEOC charge if the plaintiff was assisted by an attorney in filling out his EEOC charge form. The Sixth Circuit

subsequently held that a plaintiff could allege an additional type of discrimination in the complaint if the additional type of discrimination was identified in an EEOC investigation, or if there was no EEOC investigation. However, if the EEOC investigated and found only the type of discrimination alleged in the charge, then the plaintiff would be bound by that in ensuing litigation. *Davis v. Sodexho Cumberland College Cafeteria*, 157 F.3d 460 (6th Cir. 1998). That holding would render the plaintiff dependent on the thoroughness of the EEOC investigation, however.

The Seventh Circuit in this case has apparently held that the legal conclusions applied to factual allegations must be the same in both the EEOC charge and the litigation, overruling previous decisions to the contrary. *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164 (7th Cir. 1976)(*en banc*); *Babrocky v. Jewel Food Co. and Retail Meat Cutters*, 773 F.2d 857 (7th Cir. 1985). The Seventh Circuit panel in its opinion in this case did not cite *Jenkins*, but did, however cite a Seventh Circuit case which upheld *Jenkins*. *Cheek v. Western & Southern Life Ins. Co.*, 31 F.3d 501 (7th Cir. 1994).

I acknowledge that there is a difference between this case and *Jenkins*, perhaps qualifying as an issue of first impression requiring judicial resolution. In *Jenkins*, the plaintiff alleged discrimination based on race in her EEOC charge and then added in discrimination based on sex in her complaint. Both of those types of discrimination are covered by Title VII. This case, in contrast, involves two separate statutes, the ADA and Title VII, an issue that could not be raised with *Jenkins* or *Sanchez*. However, with regard to remedies, both of the laws have been amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981a. Also, the powers, remedies, and procedures of the ADA are the same as those of Title VII. 42 U.S.C. § 12117(a).

As my case illustrates, the existence of the ADA actually makes a ruling in my favor even more compelling. I was diagnosed by a university psychiatrist, who was paid by my department, with a mental illness. My department chairman exhibited and acted on an unreasonable fear of mental

illness, exactly the type of behavior which the ADA was designed to redress. His attitude seemed to pervade my work environment. Although he was not personally responsible for making the Microbiology Chairman hiring decision, it seemed to me that his attitude affected the decision, and that I was not hired as a result of disability discrimination and retaliation for complaints about disability discrimination.

However, within approximately the same timeframes in which I complained about disability discrimination, I also complained about sex discrimination, so, in reality, either or both may have motivated the adverse employment actions about which I complained. With regard to sex discrimination itself, it was not until, in the course of litigating this complaint, that, even in the absence of formal discovery, I obtained statistical evidence which convinced me that sex discrimination was an important motive in the decision not to hire me as Microbiology Chairman. At the time the hiring decision was made, only one out of 23 IUSM department chairmen was female.

As I considered the matter further, it occurred to me that the apparent obsession with my mental health within IUSM may have been a manifestation of discrimination based on sex, rather than, or in addition to, disability discrimination. Perhaps attempts to portray me as crazy were really attempts to demean and humiliate me because I am a woman, and to disparage my complaints about sex discrimination. I observed male colleagues engaging in outrageous behavior, but they were never, to my observation, harassed about their mental health. Likewise, placing psychiatrists' reports in an employee's main personnel file is a clear violation of the ADA, 42 U.S.C. § 12112(d)(2)(B), but such actions might also constitute a manifestation of discrimination based on sex: the IUPUI administrators involved might feel such hostility toward female faculty members, especially one who complained about unlawful discrimination, that they were willing to engage in such activity. Of course, they did not tell me this.

But how could I figure all this out at the time I filed my EEOC charge? What the Seventh Circuit panel was asking me to do, in effect, was to obtain evidence sufficient to prevail in a lawsuit, just to file a viable EEOC charge. Certainly, that is too much to ask of any charging party. Even during litigation, when the plaintiff is generally represented by counsel and discovery is permitted, proving unlawful discrimination is a difficult task.

And there is more. If the ruling of the Seventh Circuit panel is allowed to stand, it would be possible for those employers with deeply entrenched sex or other unlawful discrimination to deliberately harass members of a protected class about an alleged physical or mental disability in order to mislead them about the real discriminatory motive. In that case, if plaintiffs were required to guess the discriminatory motive at the time of filing the EEOC charge (i.e. read the perpetrators' minds), most plaintiffs would not stand a chance of prevailing, and unlawful discrimination would flourish. "...the private right of action remains an essential means of obtaining judicial enforcement of Title VII.....[and by analogy, the ADA]. In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974)(citations omitted).

The Third Circuit has, I believe, aptly summarized my position (long before I thought of it):

> "If relation back were not permitted in these circumstances, a charging party might be faced with the often difficult burden of analyzing without the benefits of any discovery his employer's motivation for an action immediately after that action had occurred."

Hicks at 964-965. My position is also consistent with current EEOC guidelines. 29 CFR § 1601.12 (b). Even the District Court in this case, although it ruled against me, seemed to

support my position. At oral argument on August 26, 1999 the District Court stated,

> "The claim that is not foreclosed here is the claim that Indiana University discriminated on -- well, call it sex, call it disability, call it retaliation -- but discriminated against Dr. Srivastava by not appointing her chairman of the department....."

(see Appendix B).

Further, in this case, upon receipt of notice of the EEOC charge, IU had the option of resolving it according to prescribed remedies. The powers, remedies, and procedures for the ADA are exactly the same as those for Title VII, and therefore, the same pathway was available for resolution. 42 U.S.C. § 12117(a). IU was in no way prejudiced or prevented from administratively resolving my charge regarding the failure to hire me as Microbiology Chairman by my filing it initially under the ADA, rather than under Title VII.

I will offer one final argument in support of my position, an argument which is perfectly illustrated by *Davis*, and which leads into the second issue to be raised. The strongest defense available to a defendant employer in an employment discrimination lawsuit, regardless of the type of discrimination alleged for a given set of factual allegations, is the real, sincere, well-documented "legitimate, non-discriminatory reason." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). If there is a legitimate reason for a given adverse employment action, and the defendant employer effectively presents that reason to the court, the plaintiff will have no case, plain and simple.

II. Question 2: Must the "legitimate, non-discriminatory reason" for an adverse employment decision in an employment discrimination lawsuit be presented as admissible evidence, as previously held by this Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 8, n.9 (1981)?

The second issue raised in this petition involves a decision from a District Court, affirmed by a Court of Appeals, in conflict with a previous ruling of this Court.

This Court has held that the "legitimate, non-discriminatory reason" within the *McDonnell Douglas* burden-shifting paradigm for indirect demonstration of unlawful discrimination must be introduced as admissible evidence, and the defendant employer's officials should be subject to cross-examination on this evidence. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 8, n.9 (1981). Certainly, any employer with a legitimate reason for an employment decision should be willing, even eager, to testify about it. I have read many, many cases in which supervisors and administrators did testify.

In contrast, in my case, those responsible for the employment decisions at issue did not present any evidence to support their decisions. They requested, and obtained from the District Court, a protective order staying discovery, so they would not have to provide such information. My response to their actions is to ask the question, "What are they hiding?" The only "reason" given for the failure to appoint me Microbiology Chairman, that I allegedly had no right to apply for the position, was presented in District Court rulings and IU's briefs. I do not know whether the "reason" was devised by the District Court, by IU's attorneys, or perhaps by a secretary somewhere in IUPUI. I am asking this Court to affirm its holding in *Burdine* that, within the *McDonnell-Douglas* framework for indirect demonstration of unlawful discrimination, the defendant employer be required to present its "legitimate, non-discriminatory reason" as admissible evidence in the form of testimony by the decision-making individual(s), and apply the ruling to this case. This leads into the third issue for review.

III. Question 3: Should this Court's previous holding regarding the standards for award of attorney's fees to a

prevailing defendant in an employment discrimination lawsuit, as set forth in *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 421 (1978), be clarified, and the standards more precisely defined?

This question involves a decision from a District Court and Court of Appeals in conflict with the spirit of a previous decision of this Court, as well as differing opinions from different Courts of Appeals regarding an important question of Federal law that has not been, but should be, decided by this Court.

This Court, recognizing that the individual plaintiff is the principal agent of enforcement of employment discrimination laws, has held in *Christiansburg* that, in an employment discrimination lawsuit, a prevailing defendant employer may be awarded attorneys' fees only if certain criteria are met. The criteria are that the lawsuit must be "unreasonable, frivolous, meritless (or groundless), or vexatious....or that the plaintiff continued to litigate after it clearly became so." *Christiansburg* at 421, 422. The issue I wish to raise in this petition is that these terms are subject to varying interpretations and therefore establishment of specific criteria for assessing whether a lawsuit is "unreasonable, frivolous, or groundless" is needed.

Several Courts of Appeals have defined their own criteria pursuant to *Christiansburg* for determining whether to award attorneys' fees to a prevailing defendant in employment discrimination and other civil rights cases. The Seventh Circuit has held,

> "In seeking to determine whether a suit is frivolous, unreasonable, or groundless, courts have focused on several factors. Among those considered are whether the issue is one of first impression requiring judicial resolution; whether the controversy is sufficiently based upon a threat of injury to the plaintiff; whether the trial court

has made a finding that the suit was frivolous under the *Christiansburg* guidelines, and whether the record would support such a finding."

Unity Ventures v. County of Lake, 894 F.2d 250, 253 (7th Cir. 1990)(citations omitted). Unfortunately, this holding does not define "frivolous." The Ninth Circuit has held that attorneys' fees should not be awarded to a prevailing defendant if the litigation has survived a motion to dismiss. *Herb Hallman Chevrolet, Inc. v. Nash-Holmes*, 169 F.3d 636, 645 (9th Cir. 1999). The Eleventh Circuit has held that the criteria for determining whether attorneys' fees should be denied to a prevailing defendant are 1) whether the plaintiff established a *prima facie* case; 2) whether the defendant offered to settle; and 3) whether a full-blown trial was held. *Bruce v. City of Gainesville, Georgia*, 177 F.3d 949, 952 (11th Cir. 1999).

The District Court, in my case held, and the Seventh Circuit affirmed, that my lawsuit was frivolous because I allegedly had no right to apply for the Microbiology Chairman position, a reason that was presented without evidence, and in opposition to which I presented evidence that the reason was pretextual. I am asking this Court to find that, not only, is my case not "frivolous, unreasonable, or groundless," but that it has considerable merit. I am also asking this Court to establish specific criteria to be applied in determining whether litigation is "frivolous, unreasonable, or groundless," such that an award of attorneys' fees to a prevailing defendant may be appropriate. With regard to the criteria stated in the previous paragraph, this lawsuit has met most of the requirements established by the various circuits for denial of award of attorneys' fees to the prevailing defendant, yet the District Court found an excuse to label my lawsuit "frivolous."

Most plaintiffs are ordinary employees without a great deal of money. Employment discrimination litigation is time-consuming, difficult, expensive, and often emotionally stressful. If a District Court can, on a whim, award attorneys'

fees to a prevailing defendant, plaintiffs will be discouraged from engaging in such litigation, and the enforcement mechanism for employment discrimination laws will be eliminated. Furthermore, as happened in this case, *Christiansburg*, as it is worded, can be used by a defendant to retaliate against a non-prevailing plaintiff for bringing the lawsuit. Specific guidelines from this Court for awarding attorneys' fees to a prevailing defendant are badly needed.

IV. Question 4: Should a prevailing defendant in an employment discrimination lawsuit, in moving for award of attorney's fees pursuant to 42 U.S.C. § 2000e-5k, be required to follow the procedural stipulations of Rules 54(d)(2) and 6(b) of the *Federal Rules of Civil Procedure*?

The fourth issue addresses the fact that a United States Court of Appeals has decided an important question of Federal law that has not been, but should be, decided by this Court.

The question involves procedural requirements for filing a motion for award of attorneys' fees by the prevailing defendant in a Title VII or ADA lawsuit.[1] I had argued, in District Court and on appeal, that IU had not filed its Motion for Award of Attorney's Fees in a timely manner, as required by *Fed.R.Civ.P.* 54(d)(2).[2] The Seventh Circuit panel remarked that I had not developed that argument. In fact, I relied on the plain wording of the rule. I did not develop that argument further because I had argued that I should not be taxed attorneys' fees at all, based on the merits of the case, and based on the fact that the motion was apparently being used to threaten and intimidate me.

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[1] A prevailing plaintiff would presumably recover attorneys' fees as part of the damages, pursuant to Fed.R.Civ.P. 54(d)(2)(A).

[2] As stated in the text of the motion, IU had filed its motion pursuant to 42 U.S.C. § 2000e- 5(k), which contains no procedural requirements. I invoked the Rule 54(d)(2) time limit.

However, after reading the opinion of the Seventh Circuit panel, as well as the cited caselaw, I realized that this is an important issue. As explained, IU filed its motion pursuant to 42 U.S.C. § 2000e-5(k), a provision which does not contain any procedural requirements. Rule 54(d)(2)(B) states, "unless otherwise provided by statute or order of the court, the motion must be filed within 14 days after entry of judgment." Local Rule 54.1 for the Southern District of Indiana extends the time to thirty days, and states that failure to comply results in waiver of attorneys' fees. IU did not meet either of the procedural requirements.

The Seventh Circuit panel stated in its opinion that *Fed.R.Civ.P.* 6(b) allows a court to grant an extension of time to file motions. However, Rule 6(b) requires that a request for an extension of time be made prior to the date on which a motion is due, or that the movant show that the failure to meet the time requirement was the result of "excusable neglect." IU met neither of these conditions and therefore should not have been granted an extension of time.

The issue is similar to that regarding award of attorneys' fees pursuant to 28 U.S.C. § 1447(c) in *Mints v. Educational Testing Service*, 99 F.3d 1253, 1260 (3rd Cir. 1996), cited by the Seventh Circuit panel in this case. However, there is one important difference between this case and *Mints*: the Third Circuit in *Mints* refused to hear argument regarding the timeliness of the motion for award of attorneys' fees pursuant to Rule 54(d)(2) because the issue was not raised in the District Court. I did raise the issue in District Court-- twice.

I acknowledge that IU's delay did not excessively prejudice me in this case, but a rule is a rule. The District Court's decision to condone the lateness of IU's motion *did* prejudice me--to the tune of $28,370.83, which I could ill afford. One of the first principles I learned in litigation is that, even as a *pro se*, non-attorney litigant, I am required to comply with applicable statutes of limitations, regardless of whether or not the statute of limitations is jurisdictional. Also, during this litigation, I was bombarded with (vague)

allegations that I had not complied with statutes of limitations. It seems to me that if I am required to comply with statutes of limitations, then IU should be required to do so as well.

Furthermore, I am asking for a general ruling applicable to a class of similar cases, so I will invoke a worst-case scenario. The Seventh Circuit has held that a failure to file a timely motion for award of attorneys' fees is not jurisdictional. *S.A. Healy Co. v. Milwaukee Metro. Sewerage District*, 60 F.3d 305, 309 (7th Cir. 1995). My interpretation of the ruling of the Seventh Circuit panel in this case is that it has held that there is no time limit for filing a motion for award of attorneys' fees pursuant to 42 U.S.C. § 2000e-5(k), or pursuant to Rule 54(d)(2). That means that a prevailing party could suddenly decide, ten or twenty years after entry of judgment, even after the non-prevailing party is deceased, to move for award of attorneys' fees, and the District Court could award the fees, possibly from the non-prevailing party's estate.

As I understand it, one of the purposes of the *Federal Rules of Civil Procedure* is to move the litigation along as expeditiously as possible, and to ultimately bring finality to the litigation. The ruling of the Seventh Circuit panel would seem to allow litigation to continue forever, with no closure. I am therefore asking this Court to hold that the procedural requirements stated in Rules 54(d) and 6(b) of the *Federal Rules of Civil Procedure* be applied to motions for awards of attorneys' fees and costs made pursuant to 42 U.S.C. § 2000e-5(k). Whether or not the matter is jurisdictional, the effect should be the same -- a prevailing party that moves for award of attorneys' fees too late waives those fees.

CONCLUSION

I have argued that this petition addresses several critical procedural issues in employment discrimination law. I believe I have shown that, if the rulings of the Court of Appeals on these issues are allowed to stand, litigation to

redress unlawful discrimination in employment will become untenable, and, as a result, these important civil rights laws will be unenforceable. I pray that this Court grant a writ of certiorari and hear my case.

Respectfully submitted,

CAROLYN H. SRIVASTAVA
3105 Lehigh Court
Indianapolis, IN 46268-1320
(317) 876-0421

Pro se Petitioner

APPENDIX A

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted June 27, 2000*
Decided July 11, 2000

Before

Hon. RICHARD A. POSNER, *Chief Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*

No. 99-3272

CAROLYN SRIVASTAVA,

Plaintiff-Appellant,

v.

TRUSTEES OF INDIANA UNIVERSITY,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. 98 C 242

David F. Hamilton, *Judge.*

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*After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a).

No. 99-3272

ORDER

Carolyn Srivastava appeals an award of attorney's fees to the defendants, the Trustees of Indiana University (IU) after IU was granted summary judgment in her suit brought under Title VII of the Civil Rights Act of 1991, 42 U.S.C. § 2000e, *et seq*. Because we believe that the district court acted within its discretion in awarding attorney's fees to IU, we affirm.

Srivastava, who has represented herself pro se throughout this litigation, holds a doctorate degree in genetics and had been employed as an Assistant Scientist at the Indiana University School of Medicine (IUSM) Pediatrics Department until her contract with the University expired on June 30, 1996. In her initial complaint, Srivastava complained that IU violated the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* (ADA), by refusing to appoint her chairman of the Department of Microbiology and Immunology for IUSM on account of her diagnosed mental illness. After Srivastava twice moved to amend her complaint, the district court allowed her to file an amended complaint that dropped the ADA claims and introduced new allegations of both sex discrimination and retaliation based on her complaints of sex discrimination. On May 27, 1999, the district court granted summary judgment for IU, concluding that because Srivastava did not include allegations of sex discrimination and retaliation in her charge of discrimination filed with the Equal Employment Opportunity Commission (EEOC) --her charge alleged only violations of the ADA--she had not exhausted her administrative remedies with respect to these claims.

Srivastava appealed the grant of summary judgment. She also filed a motion for partial relief from the judgment, which the court denied on June 4, 1999. Srivastava subsequently filed two briefs in support of her motion for partial relief, and the district court denied post-judgment relief again on July 1, 1999. On July 6, 1999, IU moved for attorney's fees. After finding that Srivastava had "unreasonably multiplied and prolonged" the case, the district court granted IU's motion for fees. Srivastava then filed this separate appeal, contesting only the awarding of attorney's fees.

As a preliminary matter, both parties in this appeal address the merits of the district court's grant of summary judgment as well as the district court's decisions to strike a number of Srivastava's filings. Srivastava, however, contested the appropriateness of summary judgment in her earlier appeal that she voluntarily dismissed on August 16, 1999. By dismissing her earlier appeal, Srivastava forfeited review of the grant of summary judgment. In order for Srivastava to challenge that decision, she would have had to appeal it within 30 days of the judgment; she did not appeal within that time frame and therefore forfeited a review of the merits. *See, e.g. Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 200 (1988)("a claim for attorney's fees is not part of the merits of the action to which the fees pertain"); *Dunn v. Truck World, Inc.*, 929 F.2d 311, 312 (7th Cir. 1991)(a district court's decision on the merits and "one who waits [to appeal] the award of fees accordingly may forfeit review of the merits."). We therefore do not address the arguments regarding summary judgment or the orders to strike pleadings, and focus our attention instead on the attorney's fees award, a collateral matter largely unrelated to the issues presented in the original appeal. *See In re Stoecker*, 5 F.3d 1022, 1026 (7th Cir. 1993).

Attorney's fees may be awarded to a defendant who is the prevailing party in a case under Title VII if the district court finds that the plaintiff's action was "frivolous, unreasonable or groundless, or that the plaintiff continued to litigate after it clearly became so." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978); see also *Monroe v. Children's Home Ass'n*, 128 F.3d 591, 594 (7th Cir. 1997) (defendants in Title VII action can recover attorney's fees if plaintiff's claim is frivolous). Moreover, in awarding such fees the district court need not find that the plaintiff brought the action in bad faith. *Christianburg*, 434 U.S. at 421.

The record in this case demonstrates that Srivastava vexatiously pursued this litigation long after it became apparent that she did not fulfill a condition precedent to filing a Title VII lawsuit. As IU first pointed out in its objection to Srivastava's motion to amend her complaint, she was required to present her Title VII claims first to the EEOC in a charge of discrimination, see *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *McKenzie v. Illinois Dep't of Transp.*, 92 F.3d 473, 481 (7th Cir. 1996); *Cheek v. Western and Southern Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994). But Srivastava's EEOC charge makes no mention of sex discrimination or retaliation based on her complaints of sex discrimination, nor does the charge contain a set of facts relating to sex discrimination or retaliation. Rather, the charge explicitly alleges that IU violated the ADA and retaliated against her for her complaints about the ADA violations. Thus, Srivastava's EEOC charge clearly did not encompass the sex discrimination and retaliation claims that she alleged in her amended complaint. See, e.g., *Cheek v. Peabody Coal Co.*, 97 F.3d 200, 203 (7th Cir. 1996)(claims of sex harassment in Title VII suit were precluded because those claims were not included in EEOC charge and were not "like or reasonably related" to claims of disparate treatment that were included in EEOC charge). Nevertheless, Srivastava continued to inundate the district court with filings, including her own motion for summary judgment and another motion to amend her complaint. Even after the district court granted judgment to IU, Srivastava prolonged the suit needlessly by filing successive and untimely post-judgment motions. Finally, throughout the litigation, the district court struck documents from the record at least six times because the documents contained, in the court's own words, "scandalous, irrelevant, redundant, and late" allegations against IU and IU's attorneys. Considering Srivastava's

conduct during this litigation, even after it was plain that established case law precluded her Title VII claims, the district court did not abuse its discretion in awarding attorney's fees to IU.

Srivastava also claims the IU's motion for attorney's fees was filed after the deadline for filing such a motion expired. Under Fed.R.Civ.P. 54(d)(2)(B), a motion for attorney's fees must be filed within 14 days of the judgment unless extended by an order of the court. Local orders for extending the deadline for filing attorney's fees motions constitute court orders for purposes of Fed.R.Civ.P. 54(d)(2)(B), *Johnson v. Lafayette Fire Fighters Ass'n Local 472*, 51 F. 3d 726 (7th Cir. 1995), and local rule 54.1 for the Southern District of Indiana provides a 30-day deadline for filing motions for attorney's fees. IU, however, did not file its motion for attorney's fees until after the local rule's 30-day deadline expired: the motion for attorney's fees was not filed until July 6, 1999, more than 30 days after the denial of her first post-judgment motion[1] on June 4, 1999, and 40 days after the entr4y of summary judgment on May 27, 1999. The district court accepted the motion, and in the order granting fees, the court stated that the motion was timely.

IU argues that its motion for attorney's fees was timely because it was filed five days after the district court's July 1, 1999 order, which again denied the plaintiff's motions for relief from the judgment. Regardless of whether this July 1 order reset the deadline for filing a motion for fees, this court has ruled that the deadline under Rule 54(d)(1) is not

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[1] Although Srivastava labeled the first post-judgment motion as one under Fed. R. Civ. P. 60(b), this court deems post-judgment substantive motions filed within ten days of the judgment to be filed under Fed. R. Civ. P. 59(e). *Britton v. Swift Transp. Co.*, 127 F.3d 616, 618 (7th Cir. 1997).

jurisdictional because Fed. R. Civ. P. 6(b) allows a court to grant an extension of time with respect to most rules, including Rule 54(d). *Lorenz v. Valley Forge Ins. Co.*, 23 F.3d 1259, 1261 (7th Cir. 1994). For the same reason, we believe that a failure to file a motion for attorney's fees under 54(d)(2) within the time prescribed is not a jurisdictional defect. See *Mints v. Educational Testing Serv.*, 99 F.3d 1253, 1260 (3d Cir. 1996)(holding that the time constraint provision of 54(d)(2)(B) is not jurisdictional); cf. *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 60 F.3d 305, 309 (7th Cir. 1995)(comparing a motion for double taxable costs plus interest after settlement refusal to a request for costs under Rule 54(d)(1) and a motion for attorney's fees under Rule 54(d)(2), and concluding that the deadline for a motion for double taxable costs is not jurisdictional). In this appeal, Srivastava contends merely that IU's motion was late; she neither develops this argument nor shows how the late filing prejudiced her. We believe, however, that in accepting IU's motion for attorney's fees under Rule 54(d)(2) as timely and then granting the motion, the district court implicitly extended the deadline for filing a motion under Rule 54(d)(2). The district court did not err in accepting the motion, particularly in light of Srivastava's baseless and repetitive filings after summary judgment had been entered and her first post-judgment motion had been denied.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

FILED
SEP 9 1999
U.S. DISTRICT COURT
INDIANAPOLIS, INDIANA

CAROLYN H. SRIVASTAVA, Ph.D.,	)
Plaintiff,	)
v.	) CAUSE NO. IP98-0242-C H/G
TRUSTEES OF INDIANA UNIVERSITY,	)
Defendant.	)

ORDER

Plaintiff's motion for alteration of judgment filed September 3, 1999, is hereby DENIED for reasons the court has stated numerous times. Exhibit C to the motion is hereby STRICKEN, pursuant to Fed. R. Civ. P. 12(f).

So ordered.

Date: Sept. 9, 1999

s/David F. Hamilton
DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

Copies to:

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3105 Lehigh Court
Indianapolis, Indiana 46268

Douglas B. King
Michael Rabinowitch
Wooden & McLaughlin
1600 Capital Center South
201 North Illinois Street
Indianapolis, Indiana 46204

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAROLYN H. SRIVASTAVA,	)	FILED
	)	AUG 27, 1999
	)	US CLERK'S OFFICE
Plaintiff,	)	INDIANAPOLIS,
	)	INDIANA
v.	)	CAUSE NO. IP 98-0242-
	)	C H/G
TRUSTEES OF INDIANA	)	
UNIVERSITY,	)	
	)	
Defendant.	)	

JUDGMENT AWARDING ATTORNEYS' FEES

The court having this day granted defendant's motion for award of attorneys' fees and costs, it is hereby ORDERED, ADJUDGED, AND DECREED that defendant Trustees of Indiana University recover from plaintiff Carolyn H. Srivastava the sum of $28,370.83.

So ordered.

Date: August 27, 1999

s/David F. Hamilton
DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

Copies to:

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3105 Lehigh Court
Indianapolis, Indiana 46268

Douglas B. King
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Wooden & McLaughlin
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201 North Illinois Street
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAROLYN H. SRIVASTAVA,)	FILED
)	AUG 27, 1999
)	US CLERK'S OFFICE
Plaintiff,)	INDIANAPOLIS,
)	INDIANA
v.)	CAUSE NO. IP 98-0242-
)	C H/G
TRUSTEES OF INDIANA)	
UNIVERSITY,)	
)	
)	
Defendant.)	

ENTRY ON DEFENDANTS' MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS AND OTHER PENDING MATTERS

The court granted summary judgment for defendant on May 27, 1997[sic], and entered judgment. On July 1, 1999, the court denied plaintiff's motion for relief from judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Defendant then filed on July 6, 1999, a timely motion for an award of attorneys' fees as a prevailing party under the Civil rights Act of 1964, as amended. Plaintiff has responded, and the court held a hearing on the matter on August 26, 1999.

To recover fees, a prevailing defendant must show that the plaintiff's action was unreasonable, frivolous, groundless, and/or vexatious. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). Recognizing the stringent standard for a fee award to a defendant, and bearing in mind the fact that plaintiff has proceeded without counsel in this case, the court nevertheless finds that plaintiff's pursuit of this action has been so unreasonable, groundless, and vexatious as to justify a fee award in this case.

In prior entries the court has found that plaintiff has unreasonably multiplied and prolonged this case through repeated filings that were "scandalous, irrelevant, redundant, and late." The court has stricken numerous filings by plaintiff. Even after the court denied plaintiff's Rule 59 motion, she has tendered yet another version of an amended complaint that she seeks to pursue in this case.

Plaintiff has used her *pro se* status as a shield for filling the court's files with utterly irrelevant and scandalous accusations against a host of people. She has bombarded defendant and the court with repeated, numerous, but constantly changing theories and arguments. And at bottom, her claim in this case is that she was a victim of illegal discrimination (the type of alleged discrimination had changed throughout the case) because the Indiana University School of Medicine did not hire as a department chairman a junior faculty member whose appointment the school had already decide not to renew. This case was unreasonable, groundless, and vexatious. A fee award is fully justified. The court hereby incorporates its additional findings stated in court on August 26, 1999.

Defendant has submitted evidence that it has incurred attorneys' fees and costs totaling $28,370.83 in this case. The court has reviewed the records and finds that the rates, hours, and costs are reasonable for defending this case.

The court therefore grants defendant's motion for an award of attorneys' fees and will award fees and costs in the amount of $28,370.83. This entry represents the court's findings of fact and conclusions of law as required by Fed. R. Civ. P. 52 and 54. The court also hereby denies any further request for relief from judgment that might be found in plaintiff's post-judgment filings, and strikes Docket Nos. 76 and 78, as well as plaintiff's affidavits attached as Exhibits A and B to Docket No. 71; and Exhibits A, B, and C to Docket No. 74.

So ordered.

Date: August 27, 1999 s/David F. Hamilton
DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

Copies to:

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Indianapolis, Indiana 46268

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

		FILED
CAROLYN H. SRIVASTAVA,	)	1999 SEP 1
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO. IP 98-242-C
	)	Indianapolis, Indiana
TRUSTEES OF INDIANA UNIVERSITY,	)	August 26, 1999
	)	
	)	
Defendant.	)	

Before the
HONORABLE DAVID F. HAMILTON
TRANSCRIPT OF DEFENDANT'S MOTION FOR FEES

APPEARANCES:

For the Plaintiff:	Wooden & McLaughlin By: Douglas B. King and Michael Rabinowitch Also: Thomas Gannon 1600 Capital Center South 201 North Illinois Street Indianapolis, IN 46204
For the defendant:	Carolyn H. Srivastava, Pro se 3105 Lehigh Court Indianapolis, IN 46268
Court reporter:	Frederick C. Pratt, CSR 355 U.S. Courthouse Indianapolis, IN 46204

PROCEEDINGS TAKEN BY MACHINE SHORTHAND
COMPUTER-AIDED TRANSCRIPT

[Excerpt Containing the Court's Ruling]

THE COURT: Thank you, Mr. King.

Over the last year or so since I took this case back from Magistrate Judge Godich it has given me a great deal to think about. The federal courts pride themselves on being open forums for the vindication of civil rights. That is a vital role for these courts.

This Court and the Supreme Court in the 7th Circuit, as defense counsel have noted, have made clear that pro se litigants ---even ones with the kind of education and intellectual ability that Dr. Srivastava has -- are entitled to quite a bit of leeway in dealing with unfamiliar technicalities in legal procedure.

Both federal courts' openness to vindication claims of violations of civil rights and their willingness to extend reasonable latitude to pro se parties, however, have limits and can be abuse. They have been abused in this case.

Under the Supreme Court's decision in Christiansburg Garment Company versus EEOC, 434 United States 412, at page 421, it is clear that the Civil rights Act authorizes a district judge to exercise discretion to award fees and costs in favor of a prevailing defendant where the Court finds that the plaintiff's action is frivolous, unreasonable, meritless or vexatious.

It is clear that does not require a finding of substantive bad faith on the part of the plaintiff. It does require that the Court not simply indulge in what the court described as post hoc reasoning concluding that unsuccessful case was a frivolous case. Those are some of the basic ground rules for the defendant's motion.

In this case, the plaintiff's case clearly has been vexatious and handled in a way designed to multiply proceedings apparently without end. The plaintiff has taken

unreasonable legal positions. She has repeatedly changed her theories in this case.

Perhaps most troubling she has repeatedly, in response to -- in this case she has repeatedly introduced into this court what I can only describe as scandalous libel on a number of individuals based on no apparent evidence or foundation, matters that have essentially been irrelevant to proceedings before this Court.

I refer, among other things, to matters having to do with Dr. Srivastava's difficulties with her Faith Congregation, the IHC and rabbi there, as well as to just amazing statements concerning Chancellor Bepko and Dr. Holden. Those stand out in my recollection of this case.

What's more, the very foundation of this case, although it was not - - strictly speaking - - legally foreclosed by Judge McKinney's decision in the case dealing with the School of Medicine's decision not to renew Dr. Srivastava's appointment as a junior faculty member there, the foundation of this case is utterly frivolous.

The claim that is not foreclosed here is the claim that Indiana University discriminated on - - well, call it sex, call it disability, call it retaliation - - but discriminated against Dr. Srivastava by not appointing her chairman of the department that wouldn't renew her appointment as a junior faculty member. That is patently frivolous.

I am not awarding fees under Rule 11. I am awarding fees under the Civil Rights Act, under the Christiansburg Garment standard. I am awarding those fees for all of Indiana University's attorneys time and costs in defending this case.

I have reviewed the affidavit. Frankly, I think the bills show exercise in billing judgment. And I'm surprised they're not higher given the incredible multiplication of proceedings that Dr. Srivastava has imposed on the defendant, as well as on the Court, and I'm going to enter a judgment awarding the sum of $28, 370.83 against Dr. Srivastava.

In addition, to the extent that other documents before me ask for any further relief, from the Court's judgment

those requests are denied for the reason that the Court has stated many times in writing.

In addition, in the post judgment filings Dr. Srivastava's affidavits that she has submitted, including the new charges of perjury, intimidation and harassment will also be stricken.

Frankly, this is the kind of case where a realistic and practical discussion should have led to an agreed resolution, if not long ago, then after the Court's judgment.

A plaintiff who sincerely believes she has a case can pursue it. She does so, however, at the risk to be found objectively to have pursued frivolous and unreasonable claims, and to be subject to sanctions of this kind under Title 7 under the Civil Rights Act.

It is understandable that counsel for the university made an approach by phone to see if it would be possible to resolve this matter. To then have that phone call treated as threatening, with charges that it amount - - in this Court's mind - - that it amounted to a crime, seems to indicate that rational communication on this subject was not possible. Perhaps it will be in the future.

Let me say a couple more things on that subject. When lawyers or courts present people with unpleasant consequences or options, or possible consequences and decisions, that is not a matter that has anything to do with extortion, threats, intimidation or harassment.

Dr. Srivastava, you have invoked the coercive power of the federal courts on your behalf. Courts don't ask people to do things. Ultimately, they exercise power that is backed up - - the most fundamental level - - by law enforcement forces and, ultimately, even the United States military. This is not about asking.

When a defendant is being told by a plaintiff, I'm going to ask a court to order you to pay me many thousands of dollars, to order federal marshals to escort me to the chancellor's office of IUPUI to replace Chancellor Bepko, the defendant has a right to defend itself. It has a right to assert its rights under law, and it has a right to propose compromise and to point out the possible consequences if no

compromise is reached. I don't think there's any reason to believe anything else happened.

I will enter a judgment to this effect. And whether it will be collectable, I don't know, but that's a matter that I leave to IU and perhaps to some rational discussions that might ensue in the future.

That will be the Court's ruling. And with that court is adjourned.

THE CLERK: All rise.

(Matter concluded.)

CERTIFICATE OF COURT REPORTER

I certify that the foregoing is a correct transcript from reported proceedings in the above-entitled matter.

s/ Fred Pratt
FRED PRATT, CSR
Official Court Reporter
Southern District of Indiana
Indianapolis Division

8-27-99
Date

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAROLYN H. SRIVASTAVA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO. IP 98-0242-C H/G
	)	
TRUSTEES OF INDIANA UNIVERSITY,	)	
	)	
	)	
Defendant.	)	

ENTRY

The plaintiff's motion for partial relief from judgment, filed on June 2, 1999, briefed on June 21, 1999, and supplemented on June 28, 1999, is denied.

1. Relief pursuant to Rule 59(e) of the Federal Rules of civil procedure is warranted if the movant presents newly discovered evidence that was not available at the time of trial or if the movant points to evidence in the record that clearly establishes a manifest error of law or fact. *Russell v. Delco Remy Div. of General Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995); *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir. 1995)(quoting *FDIC v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986)). Plaintiff has not made either showing in this case.

2. Plaintiff argues that she should not be assessed costs on the theory that defendants engaged in misconduct. There is no basis for that argument. If there was any misconduct in this case, it was plaintiff's repeated improper, irrelevant, and scandalous filings.

3. Contrary to plaintiff's latest argument there are no claims under 42 U.S.C. § 1983 in the case, at least after the court granted, over defendants' objections, plaintiff's last

motion for leave to amend her complaint. The operative complaint is the "Revised Amended Complaint Under Title VII for Discrimination" filed September 10, 1998. That complaint names only the Trustees of Indiana University as defendant and asserts no claims under § 1983.

Date: July 1, 1999

s/David F. Hamilton
DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAROLYN H. SRIVASTAVA,	)	FILED
	)	JUNE 4, 1999
	)	US DISTRICT COURT
Plaintiff,	)	INDIANAPOLIS,
	)	INDIANA
v.	)	CAUSE NO. IP 98-0242-
	)	C H/G
TRUSTEES OF INDIANA	)	
UNIVERSITY,	)	
	)	
Defendant.	)	

ENTRY

In her motion for partial relief from judgment, filed on June 2, 1999, the plaintiff correctly recognizes that the defendant has been awarded costs in this action.

The plaintiff's post-judgment motion assumes, incorrectly, that awarding the defendant its costs in this action requires the plaintiff to pay the defendant's attorney fees. This is not the case. The costs awarded are those itemized in 28 U.S.C. § 1920, to the extent applicable in this case.

The Court of Appeals has "recognized only two exceptional circumstances to overcome the presumption that a prevailing party should get costs: (1) when he or she has engaged in some misconduct or other action worthy of penalty or (2) when the losing party is indigent." *Smith v. DeBartoli*, 769 F.2d 451, 453 (7th Cir. 1985). Even this latter factor is not an impediment to the normal process, moreover, so long as the process does not render the non-prevailing party destitute. *McGill v. Faulkner*, 18 F.3d 456

(7th Cir.), *cert. denied*, 115 S. Ct. 233 (1994). Neither of the two exceptional circumstances are present in this case. The plaintiff's motion for partial relief from judgment is therefore denied.

The plaintiff remains entitled to object to the costs sought by the defendant, if costs are in fact sought.

So ordered.

s/David F. Hamilton
DAVID F. HAMILTON, Judge
United States District Court

Date: June 4, 1999

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAROLYN H. SRIVASTAVA, Plaintiff, v. TRUSTEES OF INDIANA UNIVERSITY, Defendant.	FILED MAY 27, 1999 US DISTRICT COURT INDIANAPOLIS, INDIANA CAUSE NO. IP 98-0242-C H/G

FINAL JUDGMENT

The court having this day entered summary judgment in favor of defendant Trustees of Indiana University and against plaintiff Carolyn Srivastava, it is hereby ORDERED, ADJUDGED, AND DECREED that plaintiff Carolyn Srivastava take nothing by her complaint against defendant Trustees of Indiana University, and that this action is DISMISSED WITH PREJUDICE, with costs to defendant.

Date: May 27, 1999

s/David F. Hamilton
DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAROLYN H. SRIVASTAVA,	)	FILED
	)	MAY 27, 1999
	)	US DISTRICT COURT
Plaintiff,	)	INDIANAPOLIS,
	)	INDIANA
v.	)	CAUSE NO. IP 98-0242-
	)	C H/G
TRUSTEES OF INDIANA	)	
UNIVERSITY,	)	
	)	
Defendant.	)	

ENTRY GRANTING SUMMARY JUDGMENT AND STRIKING SCANDALOUS, IRRELEVANT, REDUNDANT, AND LATE FILINGS

Plaintiff Carolyn Srivastava's service as a member of the faculty of the Indiana university School of Medicine ended in controversy. In Srivastava's efforts to sue the university, she has submitted materials reporting on her psychological troubles and, in the most recent filings, a criminal prosecution for stalking. As explained below, the court concludes that the undisputed facts in the record show that the defendant university is entitled to summary judgment on Srivastava's claims. In addition, a number of documents that Srivastava has filed with the court include irrelevant and scandalous material, are redundant, and/or were filed late without good cause, and are stricken.

Background

On September 10, 1998, the court granted Srivastava's motion to file her Revised Amended Complaint. At the same time, however, the court ordered her to show cause why

summary judgment should not be entered against her based on failure to pursue her claims of sex discrimination and retaliation before the EEOC, and based on the 300-day statute of limitations for Title VII claims. Srivastava responded to the show cause order and filed her own motion for summary judgment. Then, between January 28, 1999, and March 1, 1999, Srivastava filed a series of documents concerning a dispute with her religious congregation. Those documents refer to the stalking charge against Srivastava.

In the entry for September 10, 1998, the court reviewed the earlier history of this lawsuit and Srivastava's earlier lawsuit in which she challenged the university's decision not to renew her faculty appointment. The court will not repeat that history here, but two points from that history deserve emphasis. First, Srivastava's earlier case resolved against her the challenge to the university's decision not to renew her faculty appointment. This case is therefore limited to her challenge to the university's decision to reject her application to be appointed chairman of the Department of Microbiology and Immunology for the School of Medicine. Second, Srivastava had provided something of a moving target in this case. Over the university's objections, the court granted Srivastava's final request to amend her complaint so as to make the "Revised Amended Complaint" the operative pleading. Further attempts to amend the pleadings are not warranted and are not fair to a defendant that has confronted repeated efforts by Srivastava to revise her claims.

Discussion

Under Rule 56 of the Federal Rules of Civil procedure, the court should grant summary judgment if the undisputed facts set forth in the record show that there are no genuine issues of material fact and that one side is entitled to judgment as a matter of law. Summary judgment is not a substitute for a jury's evaluation of conflicting evidence, but

when the evidence before the court shows that there are no genuine issues of material fact, summary judgment is mandatory, not discretionary.

The record before the court shows that the university is entitled to summary judgment. The undisputed facts show that Srivastava never took to the EEOC her current charges of sex discrimination and retaliation for complaints of sex discrimination. The court noted in the previous entry that, as a general rule, a Title VII plaintiff may not bring claims in a lawsuit that were not included in her EEOC charge. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *Cheek v. Western & Southern Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994). Srivastava's claims of sex discrimination and retaliation are not "like or reasonably related to" her EEOC charges of disability discrimination and related retaliation. See *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989)(plaintiff's claim of racial harassment was not within scope of EEOC charge of racially discriminatory failure to promote).

Srivastava has not brought her case within the scope of *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164, 168-69 (7th Cir. 1976)(*en banc*). Srivastava's EEOC charge that was *not* resolved in the earlier lawsuit was EEOC Charge No. 240972835. That charge gives no hint of sex discrimination. It complains only about disability discrimination. As a result, the failure to mention sex discrimination in the charge cannot be excused as a mere failure to check the correct box on the EEOC form.

In response to the order to show cause, Srivastava argues that she described the claim as one based on sex discrimination in her previous lawsuit, when she and the university were disputing whether her challenge to the selection of the new department chairman decisions should be litigated in that case.

Srivastava's argument underscores her repeated efforts to change the claims she is asserting. She filed her original complaint in this action -- alleging disability discrimination in the selection of the department chairman -- *after* she made

the arguments in the earlier case concerning sex discrimination. Srivastava's approach to her dispute resembles a kaleidoscope in which patterns change constantly but sometimes repeat or resemble earlier patterns. Whenever Srivastava has confronted a legal challenge to her claims, she has attempted to twist the kaleidoscope a little further to change the nature of her claims to avoid the new challenge. Up to a point, of course, a litigant (especially a *pro se* litigant) may modify her claims, but there are limits. The court has extended Srivastava a great deal of latitude by allowing her, over defendant's objection, to recast what was once a disability discrimination lawsuit as a sex discrimination lawsuit. To indulge any further Srivastava's efforts to alter the character of her claims would not be fair to the defendant and would undermine the court's efforts to identify disputes over alleged employment discrimination and to resolve them promptly and fairly.

In any event, Srivastava's effort to save her claim of sex discrimination must fail. Arguments made in another *lawsuit* in a district court cannot satisfy an employee's legal obligation to present her charges first *to the EEOC*. Defendant university is entitled to summary judgment on Srivastava's claims because she never presented to the EEOC the claims of sex discrimination and related retaliation that she is pursuing now.

The statute of limitations issue raised as an alternative basis for summary judgment presents a more tangled picture from a technical point of view. The picture is confusing because of the strange parallel disputes concerning the university's decision not to renew her appointment to a junior faculty position and Srivastava's later application to be appointed department chairman. After considering the parties' submissions on this issue, the court concludes that it need not base the decision in this case on the statute of limitations issue because the university is entitled to summary judgment based on the scope of the EEOC charge. From a practical standpoint, however, it is difficult to imagine how Srivastava could have been deemed

qualified to serve as chairman of a department that had just decided not to renew her appointment as a junior faculty member.

Plaintiff filed her own motion for summary judgment. Lest there be any misunderstanding, the court has considered her motion, and it is denied. The complete record before the court shows that defendant has proferred a legitimate nondiscriminatory reason for not appointing as department chairman a junior faculty member on leave after her appointment was not renewed. The legitimate reason is that a person deemed not qualified to serve as a junior faculty member would not be qualified to serve as department chairman.

The court cannot overlook Srivastava's numerous filings that are, in varying combinations, scandalous, irrelevant, redundant, and late. Those filings are Docket Nos. 41, 43, 44, 45, 46, 47, 48, 50. and 51. Those filings are hereby STRICKEN.

The court will enter final judgment in favor of defendant Trustees of Indiana University, with costs.

So ordered.

Date: May 27, 1999

s/David F. Hamilton
DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAROLYN H. SRIVASTAVA, Ph.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	IP 98-242-C-H/G
	)	
TRUSTEES OF INDIANA UNIVERSITY,	)	
	)	
	)	
Defendant.	)	

ENTRY

The plaintiff's second motion to modify record on appeal, filed on October 4, 1999, and the plaintiff's third motion to modify the record on appeal, filed on October 12, 1999, have been considered. These motions pertain to the materials entered on the docket as Items No. 13, 41, 43, 44, 45, 46, 47, 48, 50, 51, 76, and 78.

Throughout the course of this litigation, the court has had occasion to order certain materials stricken as impertinent or scandalous or as otherwise improper. The court has on each occasion explained the action. The court adheres to the view that in each instance the action taken was correct; the pervasive character of this litigation is that the plaintiff has latched onto to litigation to oppress and abuse the defendant and certain of its staff. Although this should not occur, and when it does occur should not be permitted, *see, e.g. Reis v. Morrison*, 807 F.2d 112, 113 (7th Cir. 1986)("We shall not allow the process of this court to be used as an engine of oppression. We are publishing this opinion in an effort to make this point unmistakably clear to lawyers and litigants in this circuit."), the plaintiff is entitled to

appeal the dismissal of the action and has taken steps to do so.

The plaintiff's motions to supplement the record on appeal are filed pursuant to Rule 10(e) of the *Federal Rules of Appellate Procedure*. Rule 10(e) does not grant the parties "a license to build a new record," *Anthony v. United States*, 667 F.2d 870, 875 (10th Cir. 1981), *cert. denied* 457 U.S. 1133, 102 S. Ct. 2959, *citing Borden, Inc. v. Federal Trade Commission*, 495 F.2d 785 (7th Cir. 1974), but is merely an opportunity to correct or modify the record in order to "truly disclose[] what occurred in the district court." *Fed. R. App. P.* 10(e).

The materials which were ordered stricken and returned to the plaintiff (she being the only party whose materials were ordered stricken in this case) were certainly "before" this court in the sense that they were submitted by a party, were received by the clerk, and were examined and considered by the court. Despite having made its views on the submission of these materials clear at the time they were stricken, and despite the iteration of those views in this Entry, the plaintiff is entitled to have the full record of what was considered in the course of this action presented to the Court of Appeals.

Accordingly, the plaintiff's motions filed on October 4, 1999, and on October 12, 1999, are **granted**. The clerk shall supplement the record on appeal by sending to the Clerk of the Court of Appeals the described motions, including the attachments to them, and this Entry. Of the materials designated in the plaintiff's motions currently being considered, only item No. 13 was not physically kept by the clerk. The plaintiff shall therefore tender that item to the clerk, which shall be re-filed and re-docketed when received, and upon receipt shall be sent as an additional supplemental record on appeal.

So ordered.

s/David F. Hamilton
DAVID F. HAMILTON, Judge
United States District Court

Date: Oct. 18, 1999

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NOTE TO CLERK: PROCESSING THIS DOCUMENT REQUIRES ACTION IN ADDITION TO DOCKETING AND DISTRIBUTION.

APPENDIX C

Statutory Provisions and Rules Involved in the Case

PERTINENT PROVISIONS OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

1. Section 2000e-2(a) of Title 42, United States Code, which provides:

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

2. Section 2000e-3(a) of Title 42, United States Code, which provides:

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership,

because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

3. Section 2000e-5(a) of Title 42, United States Code, which provides:

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

4. Section 2000e-5(k) of Title 42, United States Code, which provides:

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

PERTINENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT OF 1990

1. Section 12112(a) of Title 42, United States Code, which provides:

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the

hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

2. Section 12117(a) of Title 42, United States Code, which provides:

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

3. Section 12203 of Title 42, United States Code, which provides:

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of

this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively.

THE CIVIL RIGHTS ACT OF 1991

Section 1981a of Title 42, United States Code, which provides:

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5, 2000e-16) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2, 2000e-3, 2000e-16), and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5, 2000e-16) (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the

Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

o (3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112(b)(5)) or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

* (b) Compensatory and punitive damages

o (1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

o (2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)).

o (3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and

the amount of punitive damages awarded under this section, shall not exceed, for each complaining party -

+ (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

+ (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

o (4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section -

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means -

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.).

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

CODE OF FEDERAL REGULATIONS

Section 1601.12(b) of Title 29 of the Code of Federal Regulations, which provides:

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not be required to be redeferred.

FEDERAL RULES OF CIVIL PROCEDURE

1. Rule 54(d) of the *Federal Rules of Civil Procedure* which provides:

(d) Costs; Attorney's Fees.

(1) Costs Other than Attorneys' Fees.
Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

(2) Attorneys' Fees.

(A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78 . The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a) , and a judgment shall be set forth in a separate document as provided in Rule 58 .

(D) By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of

services to a special master under Rule 53 without regard to the provisions of subdivision (b) thereof and may refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) The provisions of subparagraphs (A) through (D) do not apply to claims for fees and expenses as sanctions for violations of these rules
or under 28 U.S.C. § 1927.

3. Local Rule L.R. 54.1 of the local rules of the United States District Court for the Southern District of Indiana, which provides:

Except as otherwise provided by statute or rule, the parties shall have thirty (30) days from the entry of a final judgment against a party to file a request for taxation of costs. This time may be extended for good cause shown. Failure to file such requests or to obtain leave of Court for extension of time within which to file shall be deemed a waiver of the right to make such requests.

3. Rule 6(b) of the *Federal Rules of Civil Procedure*, which provides:

Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under conditions stated in them.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAROLYN H. SRIVASTAVA, Ph.D., Plaintiff,	FILED SEP 10 1998 U.S. DISTRICT COURT INDIANAPOLIS, INDIANA
vs.	Cause No. IP98-0242 C-H/G
TRUSTEES OF INDIANA UNIVERSITY, Defendant.	

REVISED AMENDED COMPLAINT UNDER TITLE VII FOR DISCRIMINATION

Plaintiff brings a complaint against defendant "Trustees of Indiana University" for violation of Title VII rights. Plaintiff does not demand a jury trial.

I. PARTIES

A. Plaintiff Carolyn H. Srivastava is a female resident of Indiana whose address is 3105 Lehigh Court, Indianapolis, IN 46268

B. Defendant "Trustees of Indiana University" has legal controlling authority over Indiana University-Purdue University at Indianapolis ("IUPUI"), Indianapolis, Indiana. Indiana University School of Medicine ("IUSM") is a division of IUPUI, which is an arm of the State of Indiana. Defendant is represented by Counsel Douglas B. King and Michael

Rabinowitch, WOODEN & MCLAUGHLIN, 1600 Capital Center South, 201 North Illinois Street, Indianapolis, IN 46204.

II. JURISDICTION

1. This complaint is brought pursuant to Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), and jurisdiction is based on 42 U.S.C. § 2000e-5 and 28 U.S.C. §§ 1331 and 1343 (a)(4).

2. Plaintiff timely addressed the issues in this complaint in a University grievance hearing, held August 17, 1996, with notice to the Chancellor and the IUPUI Affirmative Action Office (state agency charged with investigating complaints of discrimination) on September 5, 1996. A timely charge was filed with the Equal Employment Opportunity Commission on August 29, 1997, and a Right to Sue notice was received on January 26, 1998. This action was initiated on February 20, 1998.

III. FACTS IN SUPPORT OF COMPLAINT

3. During my tenure-track appointment at IUSM, I (plaintiff) was subjected to a persistent pattern of threats, intimidation, ridicule, humiliation, and other abusive treatment which unreasonably interfered with my job performance and with my overall well-being. These actions culminated in a letter written by Gerald L. Bepko, Vice President, Indiana University, and Chancellor of IUPUI ("Bepko"), excluding me from tenure-track or tenured faculty status at IUPUI; and a statement made by Dr. Richard Schreiner, Chairman of the Department of Pediatrics at IUSM ("Schreiner") that he intended to communicate falsely defamatory information in my personnel file to other potential employers. These actions taken together would deny me job opportunities for which I was qualified and force me back into a hostile and abusive work environment. A chronology of relevant events follows.

4. I (Plaintiff) have a Ph.D. in genetics. I began my employment at IUSM as a postdoctoral fellow on June 1, 1987. In August, 1990, I became employed in the Department of Pediatrics, IUSM, as a Research Associate. I was promoted to Assistant Scientist, effective on or about July 1, 1991.

5. On or about July 1, 1993, with the strong support of Dr. Ora Pescovitz, Director of the Section of Pediatric Endocrinology/Diabetology and my immediate supervisor ("Pescovitz"), and Schreiner, I began my appointment as Assistant Professor in the Department of Pediatrics, another promotion. I signed a contract extending from July 1, 1993 through June 30, 1996, and an appointment letter, dated June 24, 1993, as part of that contract.

6. In spring, 1994, I expressed unhappiness with certain conditions of work, which were preventing me from doing my job to the best of my ability, to Pescovitz. As a result, she asked me to leave before the expiration of my contract. I did not do so. The more favorable conditions of work which I was requesting had been provided to my male counterparts in the section.

7. In an annual review dated August 16, 1994, and signed by Schreiner, my progress as an assistant professor was rated satisfactory, and it was stated that reappointment for the 1996-1997 academic year would be recommended. I was meeting the legitimate expectations of the job.

8. My relationship with Pescovitz became very strained. In a meeting in fall, 1994, I asked her why she was not helping me to progress as a faculty member. Her answer was "revenge." By that time, she had created an extremely hostile and abusive work environment for me.

9. In a letter dated March 16, 1995, Schreiner notified me of his decision not to reappoint me for the 1996-1997 academic year, and that my appointment would end June 30, 1996.

10. In early 1995, I was a member of the IUPUI Institutional Biosafety Committee, for which my work was rated better than satisfactory. In February-March, 1995,

Schreiner ordered my removal from the committee and replaced me with a less qualified male faculty member.

11. On November 3, 1995, I was put on forced "medical leave" until the end of my appointment on June 30, 1996, for making some comments which offended Pescovitz. I was warned that if I entered my workplace, I would be forcibly removed by University security. As a result, I could not do my job.

12. During the period from approximately fall, 1994 through August, 1996, Schreiner repeatedly harshly reprimanded me for "inappropriate behavior", "outrageous and extreme behavior", "gross professional misconduct", etc., for no reason. I felt humiliated and intimidated by this. Also during that period, an environment was set up in the Department of Pediatrics in which individuals could make any accusation against me and no matter how outrageous, it would be accepted as fact by Schreiner. If I complained about uncollegial behavior toward me, my complaints were immediately discounted or labeled false accusations or unprofessional behavior.

13. In spring, 1996, I requested a University grievance to address the non-reappointment decision of March 16, 1995 and conditions of work. A Preliminary Conference aimed at mediation and reconciliation was held on May 15 and May 20, 1996. At the conference, Pescovitz offered me my "old job" back, but Schreiner said I could not return to the Department of Pediatrics.

14. On July 13, 1996, I received a copy of a letter dated June 20, 1996 from Bepko to Dr. Kathy Warfel, then President of the IUPUI Faculty Council. The letter states that my work was not up to the high standards required for a *permanent* appointment [emphasis mine] at Indiana University, what I considered to be an inappropriate tenure decision.

15. At the time, I was under consideration for the position of Chairman of Microbiology and Immunology within IUSM, a position which had been advertised and for which I had applied. As was discussed and generally agreed

upon in the Preliminary Conference of my grievance on May 20, 1996, department chairmen are normally appointed with tenure, and that position would come with tenure. Therefore, Bepko's directive would exclude me from that position.

16. An unsigned, undated (i.e. "anonymous") evaluation entitled "Dr. Carolyn Srivastava Progress Report" which Pescovitz admitted to having written in spring, 1995, was submitted with Bepko's letter of June 20, 1996 as justification for the tenure ("permanent appointment") decision. Bepko presumably cited "Dr. Carolyn Srivastava Progress Report" when he stated in the letter that "her overall performance was impaired by her disruptive professional interactions with colleagues." By June, 1996, I had found copies of the report in all of my personnel files (Department of Pediatrics, IUSM, and IUPUI) when I examined them, unattached to any other document, the author unidentified.

17. The Preliminary Conference did not bring satisfactory resolution of my complaints, so I requested a formal hearing before a Faculty Board of Review. The Formal Hearing of my grievance was held on August 17, 1996.

18. At the hearing, Schreiner indicated that he would share negative information in my personnel files with other potential employers. Based on my examinations of my Pediatrics Department personnel file, information in the file had been falsified. Positive evaluations and information had been removed, while many unsubstantiated defamatory allegations were placed in the file without my knowledge or consent and allowed to remain there. I applied for many positions for which I was qualified; I received no positive response.

19. On approximately December 17, 1996, I received a letter from the office of Robert W. Holden, Dean, IUSM, dated December 16, 1996, announcing that an unqualified male candidate had been appointed to the position of Chairman of Microbiology and Immunology.

20. Since I knew I was more qualified than the individual appointed to the position, I wrote many letters to defendant's administrators during the period December, 1996 - July, 1997 in an attempt to resolve the matter, to no avail.

IV. STATEMENT OF LEGAL CLAIM

21. Plaintiff is entitled to relief in this action because:

a. Claim I: Defendant refused to consider plaintiff for a position for which she was qualified, Chairman of the Department of Microbiology and Immunology within IUSM, as a result of discrimination on the basis of sex, in violation of Title VII. The reasons given were pretext for discrimination based on sex.

b. Claim II: Defendant's agents deliberately falsified information in plaintiff's personnel files, included confidential medical information in them, and threatened to share this information with other potential employers, thus preventing plaintiff from obtaining employment, as a result of discrimination on the basis of sex, in violation of Title VII.

c. As a result of the actions described in Claims I and II, plaintiff would be forced back into a hostile and abusive work environment in order to earn money to pay for the essentials of living, eg. food, clothing, shelter, or would be unable to work at all.

d. As a result of defendant's practice of gender discrimination, plaintiff has suffered mental anguish, financial harm, and damage to reputation and career.

V. PRAYER FOR RELIEF

22. Based on the foregoing, plaintiff seeks the following relief:

a. Appointment as Chancellor of IUPUI, with tenure. I (plaintiff) wrote a letter dated January 9, 1998 to Defendants' Counsel, presenting reasons as to why I am more qualified than Bepko to be Chancellor of IUPUI. I also

listed specific actions which I would take to eliminate unlawful discrimination from IUPUI.

b. Correction of plaintiff's University records to accurately reflect abilities and accomplishments; removal of all unsubstantiated defamatory allegations and medical information from personnel files, and replacement of all positive evaluations and information in them.

c. An apology from Indiana University for the mistreatment to which plaintiff was subjected.

d. $4,200 attorneys' fees and expenses, and such equitable relief and compensatory damages as are deemed just and proper.

VI. AFFIRMATION OF PLAINTIFF

I, the plaintiff in the aforementioned cause, do affirm that I have read all of the statements contained in the complaint and that I believe them to be, to the best of my personal knowledge, true and correct.

Signed this 3RD day of August, 1998.

s/ Carolyn Srivastava

Carolyn H. Srivastava, Ph.D., Plaintiff

3105 Lehigh Court
Indianapolis, IN 46268
(317) 876-0421

EXCERPT FROM EEOC CHARGE NUMBER 240972835

CHARGE OF DISCRIMINATION

CHARGE NUMBER 240972835

NAME *(Indicate Mr., Ms., Mrs.)* HOME TELEPHONE
Dr. Carolyn H. Srivastava (317) 876-0421
ADDRESS DATE OF BIRTH
3105 Lehigh Court, Indianapolis, IN 46268 03/08/51

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME.

I.U. School of Medicine Cat D (501+) (317) 274-8157
1120 South Drive, Indianapolis, IN 46202
CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*
[ ] RACE [ ] COLOR [ ] SEX [ ] RELIGION
[ ] NATIONAL ORIGIN [x] RETALIATION
[ ] AGE [x] DISABILITY [ ] OTHER *(Specify)*

THE PARTICULARS ARE *(If additional space is needed, attach extra sheet(s))*:

I filed EEOC charge number 240961901 on June 12, 1996. From approximately December 1996 through July 1997, I petitioned for the position of Microbiology Chairperson in the I.U. School of Medicine. On April 25, 1997, I was informed by Dean Holden that I was not under consideration and that the School of Medicine would not meet with me further to discuss any position. I petitioned Dean Holden on July 7, 1997 regarding the position and was informed that I could not return to the I.U. School of Medicine. I believe I am being retaliated against in not being considered for the Microbiology Chairperson position for filing a previous EEOC charge in violation of the Americans with Disabilities Act of 1990, as amended.

[x] I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

s/ Carolyn Srivastava 8/29/97

Charging Party *(Signature)*

LETTER TO EEOC REGARDING MY CHARGE

3105 Lehigh Ct.
Indianapolis, IN 46268
September 5, 1997

Mr. Larry Sanner
Equal Employment Opportunity Commission
Indianapolis District Office
101 W. Ohio Street, Suite 1900
Indianapolis, IN 46204-4203

Charge No. 240972835

Dear Mr. Sanner:

Thank you for your letter of August 29, 1997. When I filed my charge with the EEOC alleging discrimination and retaliation in a decision by Indiana University School of Medicine not to hire me as Chairman of Microbiology, the investigator writing up my charge questioned me about my qualifications for the position relative to those of the candidate appointed to the position and suggested that I send supporting documentation. I wish to respond to the question of my qualifications in this letter. I have also addressed that issue in letters to Dr. Robert W. Holden, Dean, Indiana University School of Medicine and members of the Search Committee during the fall of 1996, and summer, 1997. Reprints of some of the correspondence and a copy of the advertisement for the position are enclosed as supporting documents.

According to the advertisement for the position, an active research program, as well as experience in medical and graduate education and administration is required. During my employment as a faculty member within Indiana University School of Medicine, I did have an active research program, and given my extensive experience in research, it

could easily be reactivated, should I be appointed to the position. I will point out that my research training and expertise are in the area of virology, one of the major subdisciplines of microbiology. I received outstanding training in this area from internationally renowned virologists, and therefore, my research expertise is quite relevant to the discipline of microbiology. In contrast, the area of research expertise of Dr. Hal Broxmeyer, the candidate hired into the position, is (and has been for many years) hematology, which is a separate discipline from microbiology.

When I was hired into the Department of Pediatrics, I was assigned a research project involving a protein that is made in testis. This was not an area in which I had training or experience. Initiating a project in a new area requires taking time to become knowledgeable about the work previously done in that area, as well as the questions currently being asked, and what gaps in knowledge exist. It also requires initiating contacts with established investigators in the field without the benefit of introductions by mentors. One cannot gain acceptance into a new field unless one's work is of high quality. I did succeed in establishing a research program in the assigned area and in publishing the results of the work in respected scientific journals. I also initiated a collaboration with one of the principal established investigators in the field. Finally, I began a project to investigate a novel approach to the study of testicular function. This approach combined my virology background with the testis research to investigate the use of viruses as vectors to introduce foreign genes into testis cells. Results of preliminary experiments looked promising, but the experiments had to be halted when I was unjustifiably cast out of my laboratory. More recently, the validity of this approach was confirmed by investigators at another university.

With regard to teaching, I have had significant experience in medical education, as documented in the enclosed

Curriculum Vitae. I have been involved in most aspects of teaching a medical course, including giving lectures, helping students one-on-one as a laboratory instructor, reviewing examination questions to make sure they are unambiguous, and proctoring exams. As an adjunct assistant professor in Anatomy, I also attended the statewide Anatomy discipline retreat and Anatomy faculty meetings, at which national trends in medical education and changes in the curriculum at Indiana University School of Medicine were discussed. To my knowledge, Dr. Broxmeyer has had far less experience with medical education that I have had.

I have also had experience with graduate education. I mentored one student through most of her research program, and several others through parts of their research in which I had expertise. In all cases, I worked closely with the students, and spent a considerable amount of time with them. In addition, I served on the Anatomy Department Graduate Studies Committee, which handled such issues as admission to the program, curriculum, and student performance. I have also participated in the annual meetings of the Indiana Branch of the American Society for Microbiology, which is a forum for students to present their research in a friendlier environment than a national meeting. For two years I served as a judge of the student presentations for an award which is given.

However, I believe my greatest strength lies in the area of administration, which of course impacts on the success of all department activities. A department chairman must guide the faculty through their careers while ensuring that high quality teaching and research are maintained. In making decisions about work assignments, he or she must balance the needs and abilities of individual faculty members with departmental requirements. He or she must act as a liason between faculty in the department and higher levels of administration within and outside the School of Medicine.

I believe my administrative experience is more relevant to this particular job than is that of Dr. Broxmeyer. He has supervised many individuals, but to my knowledge, he personally hired all of those whom he supervised. When one can hire the supervisees of one's choice, a supervisor can select candidates with whom he or she feels personally and professionally compatible and who will feel loyalty to the supervisor. They will therefore be relatively easy to supervise. In my position in the Department of Pediatrics, I was required to supervise individuals whom I did not hire, and over whom I did not have final authority. Yet I did successfully motivate them to carry out the projects which I designed, and as I mentioned, we did publish several manuscripts in respected journals. I believe this experience is relevant because taking over as department chairman requires supervising many faculty who have been in the department for several years and have tenure, and would therefore have no particular reason to feel loyalty to the new chairman.

It is well known within the School of Medicine that there are several tenured faculty members in the Department of Microbiology whose productivity has declined in recent years. Since the morale of the entire department has been affected, these faculty members must be motivated to become more productive. I believe I can handle that task. During my employment in the Department of Pediatrics, two of the laboratory research technicians under my supervision exhibited such poor job performance that I found it faster and easier (and with better results) to do the experiments myself than to ask them. I spent a great deal of time with each of the technicians to attempt to motivate them to improve their job performance. However, they both elected to leave the laboratory within a few months, rather than strive to fulfill the requirements of their positions. This was an acceptable solution to me, since I did not want unproductive employees in the laboratory..

As part of my participation in the medical histology course, I worked closely with one of the Anatomy faculty members. I had the opportunity to observe that he was (and is) an excellent teacher. Not only were his lectures and answers to questions clear and well-organized, but he seemed attuned to the students' concerns and needs. Since during my first year I had not previously taught the course, I found his guidance very helpful to me personally. It seemed that no one else had previously noticed his teaching ability and commitment. I mentioned this observation to at least one colleague, and subsequently, the faculty member's teaching ability became a critical factor in his success in achieving tenure. He also recently won a teaching award. I believe that taking the time to assess faculty members' strengths is essential to giving them appropriate work assignments which result in maximum job satisfaction for the faculty member and optimal functioning of the department.

As noted in my Curriculum Vitae, I served on three University-wide committees. In this capacity, I learned about issues involving IUPUI and Indiana University. I believe it is important for a department chairman to have some knowledge about the functioning of the University as a whole. I also learned a great deal by going through a University grievance procedure. To my knowledge, Dr. Broxmeyer has confined his activities to the School of Medicine.

Finally, prior to my employment in Pediatrics, I worked for three years as a postdoctoral fellow in the laboratory of Dr. Broxmeyer, and I contributed significantly to his research effort. Subsequently, when I discussed my problems in Pediatrics with him, he seemed far more sympathetic to those who were treating me badly than to me. At the time of my problems, he was a tenured full professor in a prominent position with significant financial resources at his disposal, as well as possible faculty positions. He also had a wide network of contacts within the scientific community. Yet he

never offered to give me a position, or to directly put me in contact with someone who may have had an opening, or to intercede on my behalf in the severe discrimination to which I was subjected in the Department of Pediatrics. Despite the fact that I had worked hard and contributed to his research, and he was in a relatively secure, high level position, he was unwilling to help me in any meaningful way.

Who is more qualified to assume a difficult administrative position, someone who has taken a strong stand against discrimination or someone who was given the opportunity to do so but did nothing? I believe I was punished for my complaints about discrimination while Dr. Broxmeyer was rewarded for going along with it.

To summarize, the reasons (taken from this letter as well as the enclosed reprints) for my conviction that I am far more qualified than Dr. Broxmeyer for the position of Chairman of Microbiology are

1. My area of research expertise is one of the major subdisciplines of microbiology, while his is not microbiology at all

2. I have had more experience and involvement with medical and graduate education than has Dr. Broxmeyer.

3. I have demonstrated perseverance in solving a difficult administrative problem involving my supervisors.

4. My supervisory experience is more relevant than his to this particular position in that I supervised individuals whom I did not hire.

5. I have demonstrated that I can handle employees whose job performance is inadequate, and that I can recognize people's strengths

6. As an adjunct faculty member in a comparable department (Anatomy), I took the opportunity to observe and learn how a basic science department is run

7. In pursuing a University grievance, EEOC charge, and federal lawsuit, I have become familiar with University policies and federal laws affecting employer-employee relations and I can therefore ensure that they are followed.

8. During my time spent at home, I have had an opportunity to think about approaches which might be taken to solve the problems in the department. I have also learned from personal experience how not to treat a faculty member.

I am firmly committed to ensuring that the taxpayers and students of Indiana receive the highest quality medical education, and I am sure that Dr. Holden, Dean of Indiana University School of Medicine, has the same goals. Therefore, I ask that you share this with him, so that he may reconsider his decision taking into account the facts related in this letter.

The investigator taking my charge mentioned that the EEOC can provide a mediator to help resolve charges. I would like to take advantage of that service. Please advise me as to how to proceed.

In conclusion, I wish to add here a comment about actions I would take as chairman. I would establish an environment in which discrimination and prejudice are not tolerated, and in which diversity is appreciated, an atmosphere in which each person is treated as an individual, rather than according to a stereotype. I have personally experienced the intense pain that results from extreme discrimination; I would never permit such behavior by anyone within my jurisdiction. I believe I am the only candidate for Chairman of Microbiology that can fully appreciate the devastating effects discrimination can have on an employee.

Thank you for your consideration. I look forward to hearing from you.

Sincerely,

s/ Carolyn Srivastava

Carolyn H. Srivastava, Ph.D.

encl.

Supreme Court, U.S.
FILED
NOV 3 2000
OFFICE OF THE CLERK

(2)

No. 00-505

IN THE

Supreme Court of the United States

CAROLYN H. SRIVASTAVA,

Petitioner,

v.

TRUSTEES OF INDIANA UNIVERSITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals [Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit ("Petition"), Appendix A, pp. 1-7], dated July 11, 2000, an unpublished opinion. The Judgment Awarding Attorneys' Fees and Entry on Defendants' Motion for Award of Attorneys' Fees and Costs and Other Pending Matters (Petition, Appendix B, pp. 10-14) dated August 27, 1999, both of which are unpublished.[1]

PRELIMINARY STATEMENT

The Petition for Writ of Certiorari should be denied because there is no special or important reasons for granting review. The Seventh Circuit's decision does not decide an important question of federal law, has absolutely no national impact, does not present a conflict with decisions from other circuits, and is consistent with this Court's holding in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). In addition, the Seventh Circuit was correct when it ruled that the District Court did not abuse its discretion when it awarded attorney's fees in favor of the Respondent, the only ruling on appeal in this case, in light of Petitioner's frivolous claims and baseless and repetitive filings after summary judgment had been entered.

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1. In the Petition, Petitioner also identifies "[t]he prior opinions of the United States District Court for the Southern District of Indiana, case number IP98-0242-C-H/G, entered September 9, 1999, August 26-27, 1999, July 1, 1999, June 4, 1999, May 27, 1999, and October 18, 1999", as opinions that are now on appeal and before this Court. Such opinions and orders were not on appeal to the Circuit Court and are not now before this Court.

STATEMENT OF THE CASE

Petitioner's Statement of the Case, which includes her "Statement of Material Facts" and discussion of a "Previous Action", contains irrelevant facts that are not supported by evidence in the record on appeal and addresses issues which were not before the District Court or the Circuit Court when it affirmed the District Court's award of attorney's fees in favor of the Respondent. The following Statement of the Case addresses only the facts and procedural history pertinent to the opinion of the District Court that was on appeal to the Circuit Court.

I. Statement of Material Facts

The Petitioner was hired by Respondent as an Assistant Professor in the Indiana University School of Medicine (IUSM) as a "tenure probationary" employee for a period to begin July 1, 1993, and ending June 30, 1996. On March 16, 1995, the Petitioner was notified of the Respondent's decision to not reappoint her to the IUSM faculty at the expiration of her existing period of employment on June 30, 1996. The Petitioner was informed that the reasons for her non-reappointment were that she was unlikely to obtain external grant support and after careful consideration of overall performance. On November 22, 1995, the Petitioner was placed on a paid leave of absence until her contract expired on June 30, 1996.

The Respondent's decision not to reappoint the Petitioner to the IUSM faculty is not at issue in this case. The Petitioner raised that issue in the earlier filed case of *Srivastava v. Dr. Richard L. Schreiner, et al.*, Cause No. IP97-0704 C-M/S (hereinafter referred to as "*Srivastava I*").

In *Srivastava I*, the District Court for the Southern District of Indiana, Indianapolis Division, the Honorable Larry J. McKinney, District Judge, entered summary judgment against Petitioner and in favor of the defendants.

In this case, the Petitioner alleges that, even after the non-reappointment decision was made, she applied for and was under consideration for a position as the Chairman of the Department of Microbiology and Immunology at IUSM.

On August 29, 1997, the Petitioner filed her EEOC Charge, Charge No. 240972835, in which she alleged:

> I filed EEOC charge number 240961901 on June 12, 1996. From approximately December 1996 through July 1997, I petitioned for the position of Microbiology Chairperson in the I.U. School of Medicine. On April 25, 1997, I was informed by Dean Holden that I was not under consideration and that the School of Medicine would not meet with me further to discuss any position. I petitioned Dean Holden on July 7, 1997 regarding the position and was informed that I could not return to the I.U. School of Medicine. "I believe I am being retaliated against in not being considered for the Microbiology Chairperson position for filing a previous EEOC charge in violation of the Americans with Disabilities Act of 1990, as amended."

Petition, App. D, p. 50.

II. Relevant Procedural History (Summary of Vexatious Court Filings that Unreasonably Prolonged this Litigation)

On February 20, 1998, the Petitioner commenced this lawsuit by filing a second Civil Rights Complaint against Respondent, in which she alleged discrimination based on violations of the ADA, retaliation by Respondent in response to Petitioner's filing of her first Charge of Discrimination filed with the EEOC on June 12, 1996 (the charge at issue in *Srivastava I*), and alleged civil rights violations actionable under 42 U.S.C. § 1983.

Thereafter, the Petitioner, on at least three separate occasions (before the District Court finally allowed her one last chance to amend her Complaint), attempted to amend her Complaint to assert claims under Title VII for sexual harassment and withdrew all of her claims relating to disability discrimination based on violations of the ADA. On September 10, 1998, in its Entry on Pending Motions and Order to Show Cause Why Summary Judgment Should Not Be Granted ("Show Cause Entry"), the District Court recognized that Petitioner had been a "moving target" in her lawsuits against Respondent, constantly amending her Complaints and allegations each time Respondent attempted to respond. The District Court further noted that Petitioner not only had revised her allegations in *this* lawsuit three times alone (as of that time — she would do so several times thereafter), but that she had also done so in her previous lawsuit against Respondent, *Srivastava I*.

Nonetheless, the District Court granted the Petitioner's latest Motion to Amend Complaint, stating that, "[i]ndulging plaintiff in this last effort at presenting a moving target,

the court will treat the *Revised Amended Complaint [Under Title VII for Discrimination]* as her definitive statement of her claims." The District Court then ordered Petitioner to show cause why summary judgment should not be granted against her.

After the issues the District Court requested the parties brief in its Show Cause Entry were fully briefed, on May 27, 1999, the District Court, in its Entry Granting Summary Judgment and Striking Scandalous, Irrelevant, Redundant, and Late Filings ("Summary Judgment Entry"), granted summary judgment to Respondent and against Petitioner because, in the Court's own words, "the undisputed facts show that Srivastava never took to the EEOC her current charges of sex discrimination and retaliation for complaints of sex discrimination."

In the Court's Final Judgment (part of its Summary Judgment Entry) the District Court entered "final judgment in favor of defendant Indiana University, *with costs*." On July 6, 1999, Respondent filed its Bill of Costs for $489.75.

On June 2, 1999, Petitioner filed her first Notice of Appeal in this case, appealing the Summary Judgment Entry of May 27, 1999. The United States Court of Appeals for the Seventh Circuit docketed that appeal on June 4, 1999, as Docket No. 99-2427. However, on August 16, 1999, Petitioner filed her Plaintiff-Appellant's Motion to Dismiss Appeal, which the Seventh Circuit granted, pursuant to Fed. R. App. P. 42(b).

Meanwhile, at the same time she filed her first Notice of Appeal, on June 2, 1999, Petitioner filed her (First) Motion

for Partial Relief from Judgment, in which she asked the District Court reconsider its decision to award costs to Respondent as set forth in the Summary Judgment Entry.

On June 4, 1999, the District Court denied Petitioner's (First) Motion for Partial Relief From Judgment, and in doing so clarified its award of costs, stating that "[t]he costs awarded are those itemized in 28 U.S.C. § 1920, to the extent applicable in this case." Despite the District Court's denial of Plaintiff's Motion for Partial Relief from Judgment, and its further explanation to Petitioner that the costs awarded were only those itemized in 28 U.S.C. § 1920, Petitioner continued to file documents in further support of her Motion for Partial Relief from Judgment, including her Plaintiff's Brief in Support of Motion for Partial Relief from Judgment and Plaintiff's Supplement to Brief in Support of Motion for Partial Relief from Judgment.

On July 1, 1999, the District Court, for a second time, denied Plaintiff's Motion for Partial Relief from Judgment.

On July 6, 1999, based on Respondent's continued groundless filings in pursuit of this case, Respondent filed IU's Motion for Award of Attorney's Fees, which the District Court granted on August 27, 1999, for the reasons explained in the Judgment and at the August 26 hearing. See Petition, App. B, pp. 10-19.

On July 12, 1999, Petitioner filed Plaintiff's Motion for Reconsideration of Judgment, in which she requested the District Court reconsider its award of costs in favor of Respondent for a third time, and, among other things, accused Respondent's officials of perjury and intimidation.

On August 10, 1999, Petitioner filed Plaintiff's (1) Reply Brief in Support of Motion for Reconsideration of Judgment; (2) Reply to IU's Request to Strike Affidavits; and (3) Rule 60(b) Motion for Relief from Judgment and to Amend Complaint, in which she accused the undersigned lead counsel for Respondent and Respondent's associate general counsel of intimidation and harassment, based on their phone call to her to try to informally resolve this case.

On August 26, 1999, a hearing was held on IU's Motion for Award of Attorney's Fees. At the conclusion of that hearing, the District Court granted Respondent's Motion, for the reasons explained by the Court at length to Petitioner (and Respondent) in open court. Thereafter, on August 27, 1999, the Court entered its Judgment, which the Petitioner then appealed to the Seventh Circuit.

On July 11, 2000, the Seventh Circuit affirmed the District Court's award of attorney's fees in favor of the Respondent holding that the District Court "did not err in accepting the motion [for award of attorney's fees], particularly in light of Srivastava's baseless and repetitive filings after summary judgment had been entered and her first post-judgment motion had been denied." Petition, App. A., p. 7. The Seventh Circuit panel added "[t]he record in this case demonstrates that Srivastava vexatiously pursued this litigation long after it became apparent that she did not fulfill a condition precedent to filing a Title VII lawsuit." *Id.*, at p. 5.

REASONS FOR DENYING THE WRIT

The Petition fails to present any compelling reason for granting review and this case does not decide an important issue of federal law or of national importance. The Petitioner's claims in this case have been vexatious and frivolous from the beginning and she has unreasonably prolonged this litigation. The only issue on appeal to the Circuit Court was whether the District Court abused its discretion when it granted Respondent's Motion for Award of Attorney's Fees in favor of Respondent and against Petitioner. The Seventh Circuit was correct in holding that the District Court did not abuse its discretion.

In addition, there is no conflict between the circuits with respect to awarding attorney's fees in favor of a "prevailing party" in a Title VII action. The Seventh Circuit's decision to affirm the District Court's award of attorney's fees in favor of the Respondent is consistent with the longstanding decision of this Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) and decisions from the Seventh Circuit and other circuit courts.

Finally, although the Petition raises issues regarding the substantive bases for the District Court's grant of summary judgment in favor of the Respondent, i.e. that the Petitioner failed to exhaust her administrative remedies under Title VII, the District Court's ruling in that regard was not before the Circuit Court and is not now on appeal, having been voluntarily dismissed by the Petitioner on August 16, 1999. Notwithstanding, even if the District Court's entry of summary judgment in favor of the Respondent were on appeal, there is no conflict among the circuits regarding the plaintiff's duty to exhaust administrative remedies under Title VII before filing a lawsuit in federal court and there is no compelling reason for this Court to consider that issue.

ARGUMENT

I. There is Absolutely No Compelling Reason for Granting Review; This Case Has No National Impact and There is No Conflict Among the Circuit Courts

Petitioner's appeal of the District Court's award of attorney's fees in favor of the Respondent as the "prevailing party" under 42 U.S.C. § 2000-5(k) and the Seventh Circuit's opinion that the award was not an abuse of discretion does not implicate any issue of great public concern; has absolutely no national impact; and presents no other "compelling reason" why the Petition should be granted. *See Rice v. Sioux City Memorial Park Cemetery*, 249 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)) ("A writ of certiorari should not be granted except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.")

Similarly, the Seventh Circuit opinion presents no "real and embarrassing conflict" between the circuit courts regarding recovery of attorney's fees under 42 U.S.C. § 2000-5(k). The Supreme Court clearly addressed the question of when attorney's fees can be awarded to a defendant who is the prevailing party in a Title VII action in *Christiansburg*, 434 U.S. at 421, and that standard applies today. There is no conflict among the circuits and Petitioner has identified absolutely no valid reason to change the *Christiansburg* standard. *See, e.g.*, *Bercovitch v. Baldwin Sch., Inc.*, 191 F.3d 8, 11 (1st Cir. 1999); *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 765, 770 (2d Cir. 1998); *Pennsylvania*

v. Flaherty, 40 F.3d 57, 60 (3d Cir. 1994); *Bryant Woods Inn. v. Howard County*, 124 F.3d 597, 606 (4th Cir. 1997); *Kasuri v. St. Elizabeth Hosp. Medical Center*, 897 F.2d 845, 854 (6th Cir. 1990). *Marquart v. Lodge 837, International Association of Machinists and Aerospace Workers*, 26 F.3d 842, 849 (8th Cir. 1994); *Herb Hallman Chevrolet, Inc. v. Nash-Holmes*, 169 F.3d 636, 645 (9th Cir. 1999); *Bruce v. City of Gainesville, Georgia*, 177 F.3d 949, 952 (11th Cir. 1999).

Petitioner contends that certiorari should be granted in this case to clarify and more precisely define the standards set forth in *Christiansburg*. However, neither this Court nor any circuit court has applied *Christiansburg* in a conflicting manner. In fact, the clarity and wide spread acceptance of this standard was furthered when this Court extended the *Christiansburg* standard for awarding fees to § 1983 cases and cases brought under the Americans with Disabilities Act. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *Wilson-Simmons v. Lake County Sheriff's Dep't*, 207 F.3d 818, 823 (6th Cir. 2000); *Mylett v. Jeane*, 910 F.2d 296, 299 (5th Cir. 1990).

Petitioner seeks to create confusion where none exists. Merely because circuit courts apply the *Christiansburg* standard on a case-by-case basis does not equate to the need to clarify or further define this already-established rule. Petitioner's suggestion that this Court should now set forth specific guidelines for awarding attorney's fees to a prevailing defendant, above and beyond those expressed in *Christiansburg*, is not only unnecessary, but impracticable, given the fact-specific situations in which a district court decides whether or not to award such fees. This Court clearly expressed its intent to avoid the impractical rigidity that

Petitioner suggests when in *Christiansburg* it stated that "a District Court may *in its discretion* award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in and subject to bad faith." *Christiansburg*, 434 U.S. at 418-21. (Emphasis added).

In her Petition, the Petitioner suggests there is a conflict between the Ninth Circuit's opinion in *Herb Hallman Chevrolet, Inc. v. Nash-Holmes*, 169 F.3d 636, 645 (9th Cir. 1999) and the Eleventh Circuit's holding in *Bruce v. City of Gainesville, Georgia*, 177 F.3d 949, 952 (11th Cir. 1999). Application of the *Christiansburg* holding in these two cases is not in conflict; the Ninth and Eleventh Circuits simply applied the *Christiansburg* standard to different factual situations.

In *Herb Hallman Chevrolet*, the Ninth Circuit considered the plaintiff's survival of a motion to dismiss and genuine dispute of the district court's ruling when it reversed the district court's award of attorney's fees in favor of the defendant. *Herb Hallman Chevrolet*, 169 F.3d at 645-646. In *Bruce*, the Eleventh Circuit considered the plaintiff's reasonable belief that he was terminated because of his disability when it reversed the district court's award of attorney's fees in favor of the defendant. *Bruce*, 177 F.3d at 952-953. There is certainly no "real and embarrassing conflict" between the circuit courts for resolution by this Court and there is no basis to grant certiorari in this case.

In summary, because the Circuit Court's affirmation of the District Court's award of attorney's fees in favor of the Respondent does not implicate any issue of great public

concern; has absolutely no national impact; and there is no conflict among the circuit courts regarding the *Christiansburg* standard, the Petition should be denied.

II. The Award of Attorney's Fees in Favor of the Respondent is Clearly Discretionary and Warranted Under the Circumstances; Petitioner's Claims are Frivolous and She Has Unreasonably Prolonged the Litigation

In affirming the District Court's award of attorney's fees in favor of the Respondent, the Seventh Circuit panel stated:

> The record in this case demonstrates that Srivastava vexatiously pursued this litigation long after it became apparent that she did not fulfill a condition precedent to filing a Title VII lawsuit. As IU first pointed out in its objection to Srivastava's motion to amend her complaint, she was required to present her Title VII claims first to the EEOC in a charge of discrimination, * * *. . . . Nevertheless, Srivastava continued to inundate the district court with filings, including her own motion for summary judgment and another motion to amend her complaint. Even after the district court granted judgment to IU, Srivastava prolonged the suit needlessly by filing successive and untimely post-judgment motions. Finally, throughout the litigation, the district court struck documents from the record at least six times because the documents contained, in the court's own words, "scandalous, irrelevant, redundant, and late" allegations against IU and IU's attorneys. Considering Srivastava's

> conduct during this litigation, even after it was plain that established case law precluded her Title VII claims, the district court did not abuse its discretion in awarding attorney's fees to IU.

Petition, App. A, p. 5.

An award of attorney's fees in favor of a prevailing defendant is clearly discretionary. *See Christiansburg*, 434 U.S. at 416, 422. (A district court may in its discretion allow attorney's fees to the prevailing party; a plaintiff should be assessed his opponent's attorney's fees upon a finding that her claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so"). Applying the *Christiansburg* standard, the District Court clearly did not abuse its discretion

A. The Petitioner's Complaint is Frivolous, Unreasonable, and Groundless on its Face

The Petitioner's underlying claim in this case, that the Respondent discriminated against her by not making her the chairman of a department when the Respondent had not even reappointed her as a junior faculty member, is, in the words of District Court Judge David F. Hamilton, "patently" frivolous on the merits. Petition, App. B, p. 17.

The Petitioner was hired by the IUSM as an Assistant Professor as a "tenure probationary" employee for a period to end June 30, 1996. Thereafter, the Petitioner was notified of the Respondent's decision to not reappoint her to the IUSM faculty at the expiration of her existing period of employment. She was informed that the reasons for her non-reappointment were that she was unlikely to obtain external grant support and after careful consideration of overall performance.

In *Srivastava I*, District Judge McKinney granted summary judgment in favor of the Respondent and against the Petitioner on her claim that she was discriminated against by the Respondent when it decided not to reappoint her as a junior member of the IUSM faculty in the Department of Microbiology. In this lawsuit, the Petitioner has alleged that the Respondent discriminated against her when it decided not to make her an IUSM department chairman, after it decided not to reappoint her to the IUSM faculty. Such a claim is frivolous on its face. The Respondent's decision not to appoint the Petitioner as the chairman of an IUSM department that would not reappoint her as even a junior faculty member is plainly not discrimination.

The relief the Petitioner has continued to request the District Court grant her in her Revised Amended Complaint further evidences the frivolity of her claims. In each of the complaints filed by the Petitioner, she has asked the District Court to fire Gerald L. Bepko as Chancellor of IUPUI and replace him with the Petitioner because she is "more qualified than Bepko to be Chancellor," even though the Respondent's faculty and administration have determined that the Petitioner is not qualified to be reappointed as even a junior faculty member of IUSM. Just as incredible, the Petitioner has also asked the District Court to order the Respondent to: (1) authorize her to select the Respondent's administrators qualified to handle administrative positions; and (2) award her a law degree from the Indiana University School of Law.

B. The Petitioner Has Unreasonably Prolonged This Litigation

Since filing her Civil Rights Complaint against the Respondent on February 20, 1998, the Respondent has filed no fewer than five versions of her complaint, with various

revisions to her claims and allegations so as to avoid each argument the Respondent sets forth. In fact, she has come full circle — from claiming discrimination based on a disability, to withdrawing such claims and alleging discrimination based on her sex, and then back to disability discrimination.

On August 10, 1999, even after the District Court entered summary judgment against the Petitioner and twice denied her Motion for Partial Relief from Judgment, the Petitioner filed yet another Motion to Amend Complaint. This time she sought leave not only to add claims based on the ADA, the claims which she earlier had decided not to pursue, but to add, for the first time ever, a claim based on Title IX.

Throughout this litigation the Petitioner has also caused the Respondent to incur attorney's fees unnecessarily by filing "scandalous, irrelevant, redundant, and late" papers. The District Court, on at least six separate occasions, struck documents from the Court's record because they contained scandalous, irrelevant, redundant, and late allegations. In fact, the District Court struck a total of twelve of the Petitioner's filings. In several instances, the Petitioner made such scandalous allegations against the Respondent that a response in the form of a motion to strike under Fed. R. Civ. P. 12(f) was required, which caused the Respondent to incur attorney's fees which should not have been necessary. On other occasions the District Court, recognizing the inappropriateness of the Respondent's filings, struck them *sua sponte.* Awarding attorney's fees in favor of the Respondent on that basis was *not* an abuse of discretion.

III. The District Court's Decision to Grant Summary Judgment in Favor of the Respondent is Not on Appeal or Before This Court; Even if it Were, the District Court's Ruling Was Not an Abuse of Discretion and Does Not Involve an Important Issue of Federal Law That Has Not Already Been Decided

The Petitioner requests this Court consider the substantive basis of the District Court's decision to grant summary judgment in favor of the Respondent, i.e. that the Petitioner failed to file an appropriate EEOC Charge concerning her claims of sex discrimination prior to filing this lawsuit. Essentially the Petitioner requests this Court reconsider whether a plaintiff should be allowed to assert a Title VII claim for the first time in a lawsuit, where the plaintiff failed to mention a Title VII claim in her EEOC Charge.

The correctness of the District Court's granting summary judgment to the Respondent is not now on appeal. The Respondent acknowledged that she voluntarily chose to dismiss her appeal from the District Court's Summary Judgment Entry (commenced by her on June 2, 1999, and docketed herein on June 11, 1999, as No. 99-2427) and instead seek relief from the District Court through her motions under Fed. R. Civ. P. 59(e) and 60(b). As the District Court appropriately ruled and the Circuit Court affirmed, she thereby waived her right to appeal the District Court's Summary Judgment Entry. Accordingly, the Circuit Court did not review the substantive merits upon which the District Court granted summary judgment in favor of the Respondent.

Notwithstanding, the requirement that a plaintiff assert a Title VII claim in her EEOC Charge prior to filing a lawsuit

on that claim is well-settled law that was considered by this Court long ago in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1947). Allowing a complaint in litigation to include allegations outside the scope of the plaintiff's EEOC charge would frustrate the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge. *See Cheek v. Western & Southern Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994). Since this issue was well settled prior to the District Court's ruling, the Petitioner's lawsuit and continued arguments to the contrary are frivolous. *See Unity Ventures v. County of Lake*, 894 F.2d 250, 253-54 (7th Cir. 1990); *Reichenberger v. Pritchard*, 660 F.2d 280, 288 (7th Cir. 1981).

Although the Petitioner attempts to recharacterize the issue, the issue in this case is whether the plaintiff's Title VII claims in the complaint are "like or reasonably related to the allegations of the charge and growing out of such allegations." *Id.* In this case, they clearly are not. The Petitioner's Revised Amended Complaint relates to the EEOC Charge that she filed with the EEOC on August 29, 1997, in which she alleged, in pertinent part:

> I believe I am being retaliated against in not being considered for the Microbiology Chairperson position for filing a previous EEOC charge in violation of the Americans with Disabilities Act of 1990, as amended.

As the District Court correctly observed, "Plaintiff Srivastava's EEOC Charge No. 240972835 contains *not the slightest hint of sex discrimination.*" Petition App., p. 28. (Emphasis added). Nor does it contain any statement that can be said to encompass a claim of sex discrimination or retaliation based on complaints of sex discrimination.

The Respondent's only complaint in her *EEOC Charge* No. 240972835 is that she was not "considered for the . . . Chairperson position for filing a[n] . . . EEOC Charge in violation of the Americans with Disabilities Act. . . ."

The Petitioner is unable to identify any statements in her EEOC Charge No. 240972835 that would have put the EEOC or the Respondent on notice of discrimination based *on sex*. The present case is thus not at all like *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 168 (7th Cir. 1976), or *Sanchez v. Standard Brands, Inc.*, 431 F.2d 431 F.2d 462, 464 (5th Cir. 1970), cited to by the Petitioner in her Petition. In those cases, although the plaintiffs "checked the wrong box" in their underlying EEOC charge, they *did* include in their charges as submitted to the EEOC statements which included the allegations identified in such plaintiffs' subsequent Complaints filed in the district courts.

In her Petition, the Petitioner attempts to argue that the Seventh Circuit's holding in this case and the Fifth Circuit's holding in *Sanchez* is inconsistent with the Sixth Circuit's holding in *Ang v. Proctor & Gamble Co.*, 932 F.2d 540 (6th Cir. 1991). It clearly is not. In *Ang*, the Sixth Circuit affirmed the district court's ruling that the plaintiff failed to exhaust his administrative remedies for his race discrimination claim where he only alleged national origin discrimination in his EEOC Charge and failed to even mention or check the correct box for race discrimination. *Id.*, at p. 546.

Like the plaintiff in *Ang*, the Petitioner failed to even mention or check the correct box for sex discrimination in her EEOC Charge. In fact, there are absolutely no statements in the Petitioner's EEOC Charge that could reasonably be

construed to include her current claims of sex discrimination and retaliation based on complaints of sex discrimination.

In her Petition, the Petitioner cites to *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) to suggest that the Respondent had some obligation to identify a "legitimate, non-discriminatory reason" for taking the employment action it did before summary judgment could be granted in its favor on the exhaustion of administrative remedies issue. The Petitioner fails to acknowledge, however, that filing an appropriate EEOC Charge prior to filing a lawsuit in federal court is a condition precedent that must be satisfied before the defendant has any burden to prove the basis for its employment action. *Alexander*, 415 U.S. at 47.

IV. It Was Not an Abuse of Discretion to Hold That the Respondent's Motion Was Timely Filed; The Timeliness of Respondent's Motion is Not an Appropriate Issue For This Court's Consideration

In her Petition, the Petitioner argues that this Court should review the Circuit Court's determination that the District Court did not abuse its discretion in granting Respondent's Motion for Award of Attorney's Fees because the Motion was untimely pursuant to Fed. R. Civ. P. 54. The District Court's ruling that the Respondent's Motion was timely was within its discretion and clearly does not decide an important issue of federal law or of national importance.

The Petitioner argues that the Motion was untimely because it was filed more than fourteen (14) days after the entry of summary judgment in favor of Respondent and beyond the thirty (30) day deadline for filing such a Motion

under Local Rule 54.1 for the United States District Court, Southern District of Indiana, Indianapolis Division.

The District Court clearly did not abuse its discretion when it granted the Respondent's Motion for Award of Attorney's Fees. Under Fed. R. Civ. P. 54(d)(2)(B), a motion for attorney's fees must be filed within 14 days of the judgment unless extended by an order of the court. According to Local Rule 54.1 for the Southern District of Indiana, there is a 30-day deadline for filing motions for attorneys fees. Although Respondent's Motion for Award of Attorney's Fees was filed more than thirty (30) days after the entry of summary judgment in its favor, the Motion was filed only five days after the District Court denied Srivastava's Motion for Partial Relief from Judgment.

Respondent's Motion was clearly timely in that it was filed while Petitioner was continuing to litigate her frivolous claims, and thereby continuing to cause the Respondent to incur attorney's fees that it should not have had to incur. 42 U.S.C. § 2000e-5(k) plainly authorizes a district court's exercise of its discretion to entertain such a motion when the plaintiff is unnecessarily continuing to prolong the litigation. *Eg. Christiansburg*, 434 U.S. at 422.

Indeed, the Circuit Court ruled "that the deadline under Rule 54(d)(1) is not jurisdictional because Fed. R. Civ. P. 6(b) allows a court to grant an extension of time with respect to most rules, including Rule 54(d)." Petition, App., p. 7 *citing Lorenz v. Valley Forge, Ins. Co.*, 23 F.3d 1259, 1261 (7th Cir. 1994). The Circuit Court further held that

> in accepting IU's motion for attorney's fees under Rule 54(d)(2) as timely and then granting the motion, the district court implicitly extended

> the deadline for filing a motion under Rule 54(d)(2). The district court did not err in accepting the motion, particularly in light of Srivastava's baseless and repetitive filings after summary judgment had been entered and her first post-judgment motion had been denied.

Petition, App. A, p. 7.

CONCLUSION

Based on the foregoing, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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